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*G. M. Johnson 1837*  
**TREATISE**

ON THE  
**PRINCIPLES AND PRACTICE**  
OF THE  
**ACTION OF EJECTMENT,**  
AND THE  
**RESULTING ACTION FOR MESNE PROFITS.**

**BY JOHN ADAMS,**  
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

*From the last London Edition.*

—◆—  
TO WHICH ARE ADDED,  
NOTES OF THE DECISIONS MADE BY THE SUPREME AND CIRCUIT COURTS OF THE  
UNITED STATES, AND BY THE COURTS OF THE SEVERAL STATES,  
WHOSE DECISIONS HAVE BEEN REPORTED,  
UPON THE

**ACTION OF EJECTMENT,**

AND THE  
**ACTION FOR MESNE PROFITS.**  
AND  
NOTES OF DECISIONS, UPON THOSE SUBJECTS,  
MADE IN THE ENGLISH COURTS, TO THE PRESENT TIME,  
EXCEPT THOSE CITED IN THE TEXT :  
**TOGETHER WITH THE**  
**STATUTORY PROVISIONS,**  
IN RELATION TO THOSE ACTIONS, CONTAINED IN THE  
**REVISED STATUTES OF THE STATE OF NEW-YORK :**  
AND  
**PRECEDENTS**  
OF ENTRIES, PLEADINGS AND PROCESS ADAPTED THERE TO.

—◆◆◆◆—  
**BY JOHN L. TILLINGHAST,**  
COUNSELLOR AT LAW.

**ALBANY :**  
PUBLISHED BY W. & A. GOULD & Co.,  
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.....  
1830.

*Northern District of New-York, to wit :*



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LINGHAST, Counsellor at Law.

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## **ADVERTISEMENT**

TO THE

**SECOND EDITION.**



IN the present Edition the Author has corrected some errors, and supplied some defects, which remained undiscovered until after the original publication of the Treatise ; and has, also, added some new matter, which he trusts will render the work more complete. The Chapters on Evidence, and on the Action as between Landlord and Tenant, have been enlarged ; and, in the practical part of the Work, several manuscript cases have been introduced. An alteration has also been adopted in the arrangement of the Chapters ; and at the suggestion of several professional friends, and by the kind permission of Mr. Tidd, those practical forms, to which the Author referred in the Preface to the first edition, form an Appendix to the present volume.

10, CROWN OFFICE-ROW, TEMPLE,

*May 1, 1818.*

# PREFACE

TO

THE FIRST EDITION.

---

It has been the Author's chief endeavour, in the following pages, to investigate the principles upon which the remedy by Ejectment is founded; to point out concisely the different changes which the action has undergone; and to give a full and useful detail of the practical proceedings by which it is, at this time conducted. To this end the later decisions have been very fully considered; whilst a slight mention only has been made of the more ancient cases, now, for the most part, indirectly overruled, or altogether inapplicable to the modern practice.

Before the time of Lord MANSFIELD, indeed, no regular system seems to have been formed for the government of the action; and that illustrious judge, considering an Ejectment as a fiction invented for the purposes of individual justice, endeavoured to mould it into an equitable remedy, and to regulate it by maxims, in some degree independent of the general rules of law, as well as of the practice in other actions. The erroneous principles on which this system was founded, were pointed out by the late Lord KENYON; and a material alteration, in the mode of conducting the action, took place from the time of his Lordship's elevation to the Bench. By his sound and luminous decisions, the remedy has been placed upon its true principles; and he lived to see a system nearly completed, which, uniting the equitable fictions of the particular action with the general principles of law, has preserved unbroken the great boundaries of our legal jurisprudence, and, at the same time, rendered the remedy most useful and comprehensive. The correct principles established by this great lawyer still prevail, having been uniformly maintained, and ably illustrated, by the more recent decisions of the different courts.

The Author has enlarged upon these circumstances, in order to account for the personal judgment, he has, in some instances, found it ne-



cessary to exercise with regard to decisions anterior to the time of Lord KENYON; many cases being still extant as authorities, which seem wholly inconsistent with the modern principles of the action of ejectment.

The application of the remedy as between landlord and tenant, forms also a material part of this treatise; and it has there been the Author's endeavour to give some useful practical directions respecting *notices to quit*, and the manner of proceeding on the forfeiture of a lease, at the same time explaining the principles upon which those directions are founded.

The evidence necessary to support and defend the action in common cases has also been considered; and instructions for proceeding according to the ancient practice have been added, as far as can be necessary at the present time.

For practical forms in ejectment, the reader is referred to those contained in Mr. TROTT's Appendix to his Practice of the Court of King's Bench: a collection, which appears to the Author, too complete to require addition, and too accurate to be susceptible of improvement.

5, SERJEANTS' INN,  
May 1, 1812.

# **PREFACE,**

TO

**THE PRESENT EDITION.**



Mr. Adams' valuable Treatise on the Action of Ejectment, being nearly out of print; and the *Revised Statutes of New-York*, having made numerous and important changes in the form and effect of that Action; it was believed, that a new Edition of Mr. Adams' Work, with Notes adapted to the *Revised Statutes*, and with References to the Decisions of the American Courts on the subject of Ejectment, and to those made in the English Courts since the publication of the last Edition of Mr. Adams' Treatise, would prove useful: Under that belief, the present Edition has been prepared and published.

The Text of this Edition has been carefully reprinted from the Text of a former Edition of Mr. Adams' Work, published in this Country several years since, with notes and references to some of the American Reports, by Philo Ruggles, Esq. With the paging of that Edition, the paging of the present has been made to correspond, in order to preserve uniformity in references; but no further or other use has been made of it, than is here mentioned.

It will be seen, upon examination, that *All* Mr. Adams' Treatise, including his Appendix, Index, Table of Cases, &c., is re-published in this Edition, *entire*. The additions now made, consist of Notes of American Decisions, extracted from the Reports of Cases in the Courts of the United

States, and in those of all the States in which Reports have been published; Notes of Decisions made in the English Courts, since the publication of Mr. Adams' third Edition, and some few of previous dates which had not been referred to in the Text; a Summary of the Provisions of the Statutes of Limitations of the several States, so far as they relate to Rights of Entry, and to Actions for the recovery of Land; the Statutory Provisions of the State of *New-York*, in relation to Actions of Ejectment; A collection of Forms in Ejectment, adapted to the *Revised Statutes of New-York*, the most of which have been sanctioned by the Supreme Court, and inserted, as Precedents, in the Appendix to their Rules; A Digest of Judicial Decisions in relation to the Doctrine of "*Adverse Possession*;" Tables of English and American Cases cited, and Tables of English and American Reports examined in preparing this Edition; A Table of Abbreviations; and an Index of the additional matters contained in the present Work.

The *Errata*, contain corrections of typographical and other Errors.

With a hope, that it may serve to economise the time and labour of whomsoever may consult it, this Volume is now presented to the publick.

*Albany, November, 1830.*

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# TABLE

## OF

### ABBREVIATIONS.

Ab. Abr.	Abridgement
A. D.	Anno Domini, In the year of our Lord
Addis. Rep.	Addison's Reports, ( <i>Pa.</i> )
Adm'r. Adm'rs.	Administrator, Administrators
Adm'x.	Administratrix
Aik. Rep.	Aiken's Reports, ( <i>Vt.</i> )
Amb.	Ambler's Reports
And.	Anderson's Reports
Andr.	Andrew's Reports
Anon.	Anonymous
Anst.	Anstruther's Reports
Ante	Reference to a preceding page
Art.	Article
Atk.	Atkyn's Reports
App. or Append.	Appendix
Ass.	Assize (Book of); Assizes
Bac. Abr.	Bacon's Abridgement
Barnes	Barnes' Notes of Cases of Practice in the Common Pleas
Barnew. & Ald. Rep.	Barnewall and Alderson's Reports
Barnew. & Cress. Rep.	Barnewall and Cresswell's Reports
Barnard.	Barnardiston's Reports
Bingh. Rep.	Bingham's Reports
Binn. Rep.	Binney's Reports, ( <i>Pa.</i> )
Bl. Blk. or Bl. Rep.	Sir William Blackstone's Reports
Blk. Com.	Blackstone's Commentaries
B. N. P. or Bull. N. P.	Buller's Nisi Prius
B. & P., or Bos. & Pull.	Bosanquet and Puller's Reports
B. R.	Banco Regis (in the Kings Bench)
Brayt. Rep.	Brayton's Reports, ( <i>Vt.</i> )
Bro. C. C.	Broke's Chancery Cases
Bro. Cas. Parl.	Brown's Cases in Parliament
Brod. & Bingh. Rep.	Broderip and Bingham's Reports
Brown	Brown's Reports
Browne's Rep.	Browne's Reports, ( <i>Pa.</i> )
Brown's Parl. Cas.	Brown's Parliament Cases
Bunb.	Bunbury's Reports

Burr. or Burr. Rep.	Burrow's Reports
C. Ch. Chap.	Chapter
Caines' Ca.	Caines' Cases in Error, ( <i>N. Y.</i> )
Caines' Rep.	Caines' Reports, ( <i>N. Y.</i> )
Call's Rep.	Call's Reports, ( <i>Va.</i> )
Cam. & Norw. Rep.	Cameron and Norwood's Reports, ( <i>Nor. Car.</i> )
Campb. or Camp. Ni. Pri. Rep.	Campbell's Reports, ( <i>Nisi Prius</i> )
Car.	Carolus (Charles)
Carr. & P.'s Rep.	Carrington and Payne's Reports
Carth.	Carthew's Reports
Cas. Pr. C. P.	Cases of Practice in the Common Pleas
Cas. Temp. Hard.	Cases in the Time of Lord Hardwicke
C. B.	Communi Banco, in the Common Bench, or Court of Common Pleas
Ch.	Chapter, Chancellor, Chancery
Chan. Cas.	Cases in Chancery
Chap.	Chapter
Charlt. Rep.	Charlton's Reports, ( <i>Ga.</i> )
Chip. Rep.	Chipman's Reports
Circ.	Circuit
Co. Cop.	Coke's Copyholder
Co. Litt.	Coke on Littleton, ( <i>1st Institute</i> )
Comb.	Comberbach's Reports
Com. or Com. Rep.	Comyn's (Baron) Reports
Comm.	Blackstone's Commentaries
Comp. Incumb.	Complete Incumbent (Watson's Cler- gyman's Law)
Conn.	Connecticut
Conn. Rep.	Connecticut Reports
Const. Rep.	Constitutional Reports, ( <i>So. Car.</i> )
Cooper's Cas. in Ch.	Cooper's Cases in Chancery
Cow. Rep.	Cowen's Reports, ( <i>N. Y.</i> )
Cowp.	Cowper's Reports
Coxe's Rep.	Coxe's Reports, ( <i>N. J.</i> )
C. P.	Common Pleas
Cranch's Rep.	Cranch's Reports, ( <i>U. S.</i> )
Cro.	Croke's Reports of Select Cases in King's Bench and Common Pleas
Cro. Car.	Croke's Reports in the Time of <i>Charles</i> 1st
Cro. Eliz.	Croke's Reports in the Time of <i>Eliza- beth</i>
Cro. Jac.	Croke's Reports in the Time of <i>James</i> 1st.
Crompt. Prac.	Crompton's Practice
Cru. or Cruise's Dig.	Cruise's Digest
Ct.	Court
Dal.	Dalison's Reports
Dall. Rep.	Dallas' Reports, ( <i>Pa. &amp; U. S.</i> )
Day's Rep.	Day's Reports, ( <i>Conn.</i> )

Dick.	Dicken's Reports of Cases in Chan- cery
Doc. Plac.	Doctrina Placitandi, Doctrine of Pleading
Doug. or Doug. Rep.	Douglas' Reports
Dy.	Dyer's Reports
E. or E. T.	Easter Term
East, or East's Rep.	East's Reports
Ed.	Edition
Edw.	Edward
Eng.	English
Esp. Ni Pri.	Espinasse's <i>Nisi Prius</i> Digest
Esp. or Esp. Rep.	Espinasse's Reports
Eq. Rep. (Desauss.)	Equity Reports, Desaussures, ( <i>So Car.</i> )
Eq. Ca. Abr.	Equity Cases Abridged
Ex dem.	Ex Demissione, on the demise of,
Ex. Rel., or Ex. Relat.	Ex Relatione, Upon the relation of
Ex'r., Ex'rs.	Executor, Executors
Ex'x.	Executrix
F. N. B.	Fitzherbert's <i>Natura Brevium</i>
Freem.	Freeman's Reports
Gall. or Gallis. Rep.	Gallison's Reports, ( <i>U. S.</i> )
Gilb. Eject.	Gilbert on Ejectment
Gilb. Evid.	Gilbert on Evidence
Gilb. Ten.	Gilbert on Tenures
Geo.	George
Greenl. Rep.	Greenleaf's Reports, ( <i>Me.</i> )
Gwill.	Gwillim
Halst. Rep.	Halstead's Reports, ( <i>N. J.</i> )
Hard. or Hard. Rep.	Hardin's Reports, ( <i>Ky.</i> )
Hardr.	Hardres' Reports
Harr. & Gill's Rep.	Harris and Gills' Reports, ( <i>Md.</i> )
Harr. & Johns. Rep.	Harris and Johnson's Reports, ( <i>Md.</i> )
Harr. & M'Hen. Rep.	Harris and M'Henry's Reports, ( <i>Md.</i> )
Hayw. Rep.	Haywood's Reports, ( <i>N. Car.</i> )
Hawk's Rep.	Hawk's Reports, ( <i>N. Car.</i> )
H. Bl. or H. Blk.	Henry Blackstone's Reports
Hen.	Henry
Hen. & Munf. Rep.	Hening and Munford's Reports, ( <i>Va.</i> )
Hil.	Hilary Term
Hist.	History
Hob.	Hobart's Reports.
Holt's Rep.	Holt's Reports
Hopk. Rep.	Hopkins' Chancery Reports, ( <i>N. Y.</i> )
Hutt.	Huttons' Reports
Imp. K. B.	Impey's Practice, of the Kings Bench
2 Inst.	Second Institute (Coke's <i>Magna Charta</i> )
Jac.	Jacobus (James)
Jac. & Walk. Rep.	Jacob and Walker's Reports
Jenk. or Jenk. Cent.	Jenkins' Centuries of Reports
Johns. Cas.	Johnson's Cases, ( <i>N. Y.</i> )
Johns. Rep.	Johnson's Reports, ( <i>N. Y.</i> )
Johns. Ch. Rep.	Johnson's Chancery Reports, ( <i>N. Y.</i> )



Jones	Jones' Reports
Keb.	Keble's Reports
Kirb. Rep.	Kirby's Reports, ( <i>Conn.</i> )
Ky.	Kentucky.
Latch.	Latches' Cases
Ld. Raym.	Lord Raymond's Reports
Leon.	Leonard's Reports
Lev.	Levinz's Reports
Lill. Prac. Reg.	Lilly's Practical Register
Litt.	Littleton
Litt. Rep.	Littell's Reports, ( <i>Ky.</i> )
Litt. Sel. Cas.	Littell's Selected Cases, ( <i>Ky.</i> )
La., or Loua.	Louisiana
Lut. or Lutw.	Lutwyche's Reports.
Marsh. Rep. ( <i>Eng. C. P.</i> )	Marshall's Reports of the English Common Pleas
Marsh. Rep. ( <i>Ky.</i> )	Marshall's Reports, Kentucky
Mart. Rep.	Martin's Reports, ( <i>Loua.</i> )
Mart. Rep. ( <i>N. S.</i> )	Martins Reports, New Series, ( <i>Loua.</i> )
Mas. or Mason's Rep.	Mason's Reports, ( <i>U. S.</i> )
Mass.	Massachusetts
Mass. Rep.	Massachusetts Reports
M'Cord's Ch. Rep.	M'Cord's Chancery Reports, ( <i>So. Car.</i> )
M. & S. or Maule & S. Rep.	Maule and Selwyn's Reports
Md.	Maryland
Meriv. or Meriv. Rep.	Merivale's Reports
Mod.	Modern Reports
Monr. Rep.	Monroe's Reports, ( <i>Ky.</i> )
Moore's Rep.	Moore's Reports
M. Mic., or Mich.	Michaelmas Term.
M. S.	Manuscript
Munf. Rep.	Munford's Reports, ( <i>Va.</i> )
Murph. Rep.	Murphey's Reports, ( <i>N. Car.</i> )
N	Note
Nels. or Nels. Abr.	Nelson's Abridgement
New Hamp. Rep.	New Hampshire Reports
N. P. or New Rep.	New Reports, (4th & 5th of Bosanquet & Puller)
N. Car. or Nor. Car.	North Carolina
N. Car. Law. Rep.	North Carolina Law Repository
N. J.	New-Jersey
Nott & M'C's. Rep.	Nott & M'Cord's Reports, ( <i>So. Car.</i> )
N. S.	New Series
N. Y.	New-York
Ohio Rep.	Ohio Reports. ( <i>Hammond's.</i> )
P.	Paschalis, Easter Term
Pa.	Pennsylvania
Paige's Rep.	Paige's Chancery Reports, ( <i>N. Y.</i> )
Paine's Rep.	Paine's Reports, ( <i>U. S.</i> )
Palm.	Palmer
Peake's N. P.	Peake's Nisi Prius Reports
Penn. Rep.	Pennington's Reports, ( <i>N. J.</i> )
Peter's Rep.	Peter's Reports, ( <i>U. S.</i> )

Picker. Rep.	Pickering's Reports, ( <i>Mass.</i> )
Plow. or Plowd.	Plowden's Reports
Pop. or Poph.	Popham's Reports
Post	Reference to a subsequent page
Pr. Ch. or Prec. Cha.	Precedents in Chancery
P. W. or P. Wms.	Peere William's Reports
Rand. Rep.	Randolph's Reports, ( <i>Va.</i> )
Rast. Ent.	Rastell's Entries
Raym.	Sir Thomas Raymond's Reports
Reev. E. L.	Reeve's History of the English Law
Reg. Brev.	Register Brevium
Rep.	Reports, Repository
Rep. Constit. Ct. So. Car.	Reports of the Constitutional Court of South Carolina
R. L. or Rev. L.	Revised Laws
Roberts on Fraud. Conv.	Roberts on Fraudulent Conveyances
Roll. Abr.	Rolle's Abridgement
Roll. Rep.	Rolle's Reports
Root's Rep.	Root's Reports, ( <i>Conn.</i> )
Run. Eject.	Runninton on Ejectment
S., or Sect.	Section
Salk.	Salkeld's Reports
Saund.	Saunders's Reports
Sav.	Saville's Reports
Say.	Sayer's Reports
Sch. & Lefr. Rep.	Schoales & Lefroy's Reports
Sell. Pract.	Sellon's Practice
Selw. N. P. or S. N. P.	Selwyn's Nisi Prius
Show.	Shower's Reports
Serg. & R's. Rep.	Sergeant & Rawle's Reports, ( <i>Pa.</i> )
Sess.	Session
Sid.	Siderfin's Reports
Sir T. Jones.	Sir Thomas Jones' Reports
Skin.	Skinner's Reports
So. Car.	South Carolina
South Rep.	Southard's Reports, ( <i>N. J.</i> )
Starkie's Rep.	Starkie's Reports Nisi Prius
St.	Statute
Stra., Stran. or Stra. Rep.	Strange's Reports
Sty or Styles,	Styles' Reports
T.	Term
Tit.	Title
T. or Trin.	Trinity Term
T. R.	Term Reports, ( <i>Durnford and East's Reports</i> )
Taunt. or Taunt. Rep.	Taunton's Reports
Tayl. Rep.	Taylor's Reports, ( <i>N. Car.</i> )
Tenn. Rep.	Tennessee Reports
Tyl. Rep.	Tyler's Reports, ( <i>Vt.</i> )
U. S.	United States
Ut Semb.	Ut Semble, as it seems
Va.	Virginia
Vac.	Vacation
Vent. or Ventris.	Ventris' Reports
Vern.	Vernon's Reports

<b>Ves. or Ves. Rep. (Jun. or Sen.)</b>	<b>Vesey's Reports, (Junior or Senior)</b>
<b>Ves. &amp; Beame.</b>	<b>Vesey and Beame's Reports</b>
<b>Vin. Abr.</b>	<b>Viner's Abridgement</b>
<b>Virg. Cas.</b>	<b>Virginia Cases</b>
<b>Virg. Rep.</b>	<b>Virginia Reports</b>
<b>Vol.</b>	<b>Volume</b>
<b>Walk. Copy.</b>	<b>Walker on Copyholds</b>
<b>Wall. Rep.</b>	<b>Wallace's Reports, (U. S.)</b>
<b>Wash. Circ. Ct. Rep.</b>	<b>Washington's Circuit Court Reports</b>
<b>Wash. Rep.</b>	<b>Washington Reports, (Va.)</b>
<b>Watk. Cop.</b>	<b>Watkins on Copyholds</b>
<b>Wend. Rep.</b>	<b>Wendell's Reports, (N. Y.)</b>
<b>Westmin.</b>	<b>Westminster</b>
<b>Wheat. Rep.</b>	<b>Wheaton's Reports, (U. S.)</b>
<b>Wight.</b>	<b>Wightwick's Reports in the Ex- chequer</b>
<b>Willes.</b>	<b>Willes Reports</b>
<b>Wils. or Wils. Rep.</b>	<b>Wilson's Reports</b>
<b>Wood. L. &amp; T.</b>	<b>Woodfall's Law of Landlord and Ten- ant</b>
<b>Yeate's Rep.</b>	<b>Yeate's Reports, (Pa.)</b>
<b>Yelv.</b>	<b>Yelverton's Reports</b>

# TABLE

## OF

# ENGLISH REPORTS,

(CITED IN THE NOTES, &c.)

### *Chancery.*

Atkyns' Reports, from 1737, to *December* 1754 ; 3 vols.  
 Schoales and Lefroy's Reports, (*Ireland*,) from *Easter Term* 1802, to  
March 1806 ; 2 vols.  
 Vesey, Senior's Reports, from 1746, to 1755 ; 2 vols.  
 Vesey, Junior's Reports, from 1789, to 1817 ; 19 vols.  
 Vesey and Beame's Reports, from 1812, to 1814 ; 3 vols.  
 Cooper's Cases in 1815 ; 1 vol.  
 Merivale's Reports, from 1815, to 1817 ; 3 vols.  
 Jacob and Walker's Reports, from *July* 1819, to *March* 1821 ; 2 vols.

### *Kings Bench.*

Vestris' Reports, from 20 *Car. II.* (1669,) to 3 *Gul. III.* (1690) ; 2 vols.  
 Strange's " from *Trin. Term*, 1716, to *Trin. Term*, 1747 ; 2 vols.  
 Burrow's " from *Mich. Term*, 1756, to *E. Term*, 1772 ; 5 vols.  
 Wilson's " from *Hil. Term*, 1742, to *Hil. Term*, 1753, (1st part) ;  
1 vol.  
 Douglas' " from *Mich. Term*, 1778, to *Trin. Term*, 1781 ; 2 vols.  
 East's " from *Mich. Term*, 1800, to *Mich. Term*, 1812 ; 16 vols.  
 Barnewall and Alderson's Reports, from *Mich.* 1817, to *Trin.* 1822 ; 5 vols.  
 Barnewall and Cresswell's " from *Mich.* 1822, to *Mich. Term*, 1828 ;  
8 vols.  
 Dowling and Ryland's " from *Hil. Term*, 1822, to *Trin. Term*,  
1826 ; 8 vols.

### *Common Pleas and other Courts.*

Wilson's Reports, from *Hil. Term*, 1753, to *Mich. Term*, 1769, (2d and 3d  
parts) ; 2 vols.  
 Taunton's " from *Mich.* 1807, to *Hil.* 1819 ; 8 vols.  
 Marshall's " from *Mich.* 1813, to *Mich.* 1816 ; 2 vols.  
 Moore's " from *Hil. Term*, 1817, to *E. Term*, 1821 ; 5 vols.  
 Broderip and Bingham's Reports, from *E. Term*, 1819, to *E. Term*, 1822 ;  
3 vols.  
 Bingham's Reports, from *Trin. Term*, 1822, to *E. Term*, 1829 ; 5 vols.

*Nisi Prius.*

Espinasse's Reports, from *E. T.* 1798, to *Hil. T.* 1810; 6 vols.

Campbell's " from Sittings after *Mich. Term* 1807, to Sittings after  
*Hil. Term* 1816; 4 vols.

Starkie's " from Sittings after *Mich.* 1814, to Sittings after *Mich.*  
1822; 3 vols.

Holt's " from Sittings after *Trin. Term* 1815, to Sittings after  
*Mich. Term* 1817; 1 vol.

Carrington and Payne's Reports, from *Mich.* 1823, to *E.* 1829; 3 vols.

Dowling and Ryland's Cases, from Sittings after *Hil. Term*, 1822, to Sit-  
tings after *Hil. Term*, 1823; 1 vol.

# TABLE

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# AMERICAN REPORTS,

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### *United States.*

Cranch's Reports, of the Supreme Court, from August, 1801, to February, 1815; 9 vols.	
Wheaton's " " " " " " February, 1816, to February, 1827; 12 vols.	
Peter's " " " " " " 1828, to March, 1830; 4 vols.	
Gallison's " " " Circuit Court, (1st. Circuit,) from May, 1812, to November, 1815; 2 vols.	
Mason's " " " " " (1st. Circuit,) from October, 1815, to October, 1827; 4 vols.	
Paine's " " " " " (2d. Circuit,) from April, 1810, to April, 1824; 1 vol.	
Wallace's " " " " " (3d. Circuit,) May Session, 1801; 1 vol.	
Washington's " " " " " " from April, 1803, to October, 1827; 4 vols.	

There are also several of the Decisions of the Supreme and Circuit Courts of the United States, contained in Dallas' Reports. *Vide Pennsylvania.*

### *Alabama.*

Minor's Reports, of the Supreme Court, from May, 1820, to July, 1826; 1 vol.	
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### *Connecticut.*

Root's Reports, of the Superior Court and Court of Errors, from March 1764, to July 1797; 2 vols.	
Kirby's " " Superior Court, from February 1786, to May 1788; 1 vol.	
Day's " " Court of Errors, from June 1802, to November 1813; 5 vols.	
Connecticut " " " " from June 1814, to November 1827; 6 vols.	

### *Georgia.*

Charlton's Reports of the Superior Courts of the Eastern District, from January 1805, to October 1810; 1 vol.	
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*Kentucky.*

- Littel's Selected Cases in the Court of Appeals, from *October* 1795, to *October* 1821; 1 vol.  
 Hardin's Reports, of the Court of Appeals, from *April* 1805, to *July* 1808; 1 vol.  
 Bibb's Reports of the Court of Appeals, from *October* 1808, to *May* 1817; 4 Jols.  
 Marshall's " " " " from *May* 1817, to *October* 1821; 3 vols.  
 Littel's " " " " from *April* 1822, to *June* 1824; 5 vols.  
 Monroe's " " " " from *October* 1824, to *December* 1824; 1 vol.

*Louisiana.*

- Martin's Reports of the Supreme Court, from 1809, to *February* 1823; (1st series,) 12 vols.  
 " " " " " from *March* 1823, to *July* 1826; (2d series,) 4 vols.

*Maine.*

- Greenleaf's Reports of the Supreme Court, from *August* 1820, to *April* 1829; 5 vols.

*Maryland.*

- Harris & M'Henry's Reports of several Courts, from *April* 1689, to *December* 1799; 4 vols.  
 Harris and Johnson's Reports of the General Court, and Court of Appeals, from *April* 1800, to *June* 1826; 7 vols.  
 Harris and Gill's Reports of the Court of Appeals, from *June Term* 1826, to *June Term* 1827; 1 vol.

*Massachusetts.*

- Massachusetts Reports of the Supreme Judicial Court, from *September* 1804, to *March* 1822; 17 vols.  
 Pickering's " " Supreme Judicial Court, from *September* 1822, to *March* 1829; 7 vols.

*New-Hampshire.*

- New-Hampshire Reports of the Superior Court, from *September* 1816, to *May Term*, 1829; 4 vols.

*New-Jersey.*

- Coxe's Reports of the Supreme Court, from *April* 1790, to *November* 1795; 1 vol.  
 Pennington's " " " from *May* 1806, to *February* 1812; 2 vols.  
 Southard's " " " from *February* 1818, to *May* 1820; 2 vols.  
 Halstead's " " " from *November* 1821, to *May* 1829; 5 vols.

*New-York.*

- Johnson's Cases in the Supreme Court, and Court of Errors, from *January* 1799, to *March* 1803; 3 vols.  
 Caines' Cases in the Court of Errors, from 1801, to 1805; 2 vols.  
 " Reports of the Supreme Court, from *May* 1803, to *November* 1805; 3 vols.  
 Johnson's " " Supreme Court, and Court of Errors, from *February* 1806, to *May* 1823; 20 vols.  
 " " " Court of Chancery, from *March* 1814, to *May* 1823; 7 vols.  
 Cowen's " " Supreme Court, and Court of Errors, from *May* 1823, to *August* 1828; 9 vols.  
 Hopkins' " " Court of Chancery, from *September* 1823, to *January* 1826; 1 vol.  
 Paige's " " " " from *April* 1828, to *December* 1829; 1 vol.  
 Wendell's " " Supreme Court, and Court of Errors, from *May* 1828, to *May* 1830; 3 vols., and part of 4th.

*North-Carolina.*

- Haywood's Reports of the Superior Courts, from *October* 1789, to *May* 1806; 2 vols.  
 North-Carolina Law Repository, containing Reports of several Courts, from *June* 1798, to *January* 1818; 3 vols.  
 Taylor's Reports of the Superior Courts of Law and Equity, from *March Term* 1799, to *July Term*, 1802; 1 vol.  
 Cameron and Norwood's Reports of the Court of Conference, from *June* 1800, to *June* 1804; 1 vol.  
 Murphey's Reports of the Supreme Court, 1st vol. from *December* 1804, to *July* 1810; 3d vol. during the year 1819; 2 vols.  
 Hawk's " of the Supreme Court, from *June Term*, 1820, to *December Term*, 1823; 2 vols.

*Ohio.*

- Hammond's Reports of several Courts, from *August* 1821, to *December* 1824; 2 vols.\*

*Pennsylvania.*

- Dallas' Reports of several Courts, from *September* 1754, to *April* 1806; 4 vols.  
 Addison's " of the Court of Errors, from *September* 1791, to *March* 1797; 1 vol.  
 Yeates' " " Supreme Court, from *April* 1791, to *September* 1808; 4 vols.  
 Binney's " " " " from *December* 1799, to *June* 1814; 6 vols.  
 Browne's " " Court of Common Pleas of the 1st Circuit, from *May* 1806, to *January* 1813; 2 vols.  
 Sergeant and Rawle's Reports of the Supreme Court, from *June* 1814, to *September* 1828; 17 vols.  
 Rawle's Reports from *December* 1828, to *June* 1829; 1 vol.

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\* Cited as "Ohio Reports."



*South Carolina.*

- Bay's Reports of the Superior Courts, from *November 1783, to November 1804*; 2 vols.  
 Desaussure's Reports of the Court of Chancery, from *September 1784, to December 1816*; 4 vols.\*  
 Treadway's " " Constitutional Court, from *January 1812, to November 1816*; 2 vols.†  
 Mills' " " Constitutional Court, from *May 1817, to May 1818*; 2 vols.‡  
 Nott and M'Cord's " " " " from *November 1817, to November 1820*; 2 vols.  
 M'Cord's " " Court of Appeals, from *January 1825, to May 1827*; 2 vols.§

*Tennessee.*

- Overton's Reports of several Courts, from *November 1791, to May 1815*; 2 vols.||

*Vermont.*

- Chipman's Reports of the Supreme Court, from *December 1789, to February 1824*; 1 vol.  
 Tyler's " " " " from *January 1800, to May 1803*; 2 vols..  
 Brayton's " " " " from *October 1815, to October 1819*; 1 vol.  
 Aikens' " " " " from *October 1825, to March 1828*; 2 vols.

*Virginia.*

- Cases in the General Court, from *November 1789, to June 1826*; 2 vols.†  
 Washington's Reports of the Court of Appeals, from the *Fall Term, 1790, to the Fall Term, 1796*; 2 vols.  
 Call's " " " " from *April 1797, to November 1803*; 3 vols.  
 Henning and Munford's Reports of the Court of Appeals, &c., from *September 1806, to February 1810*; 4 vols.  
 Munford's Reports of the Court of Appeals, from *March 1810, to April 1820*; 6 vols.  
 Gilmer's " " " " from *April 1820, to June 1821*; 1 vol.\*\*  
 Randolph's " " " " from *November 1821, to November 1827*; 5 vols.

\* Cited by the name of "Equity Reports."

† Cited by the name of "Constitutional Reports."

‡ Cited as "Reports of the Constitutional Court of South Carolina."

§ Cited as "M'Cord's Chancery Reports."

|| Cited as "Tennessee Reports."

|| Cited as "Virginia Cases." The first volume by Brockenbrough and Holmes; and the second volume by Brockenbrough.

\*\* Cited as "Virginia Reports."

# VICE

## MENT.

ON OF

1.  
 imital  
 Cairnes,  
 21, for "disse."  
 line 28, for "render"  
 line 7, for "East,"  
 (th.) line 8, for "Piker," read,  
 line 6, for "thet ime," read, the time.  
 58 & 9, line 19, for "ast," read, as.  
 59, line 50, for "Jackson," read, Johnson.  
 " (4th.) line 31, for "Tho terms," read, The term.  
 " (7th.) line 4, add *note (g.)* as follows: (g.) *Doc. d. Du-*  
*Plow. 386. R. 200; et vide Stowell v. Ld. Zouch.*  
 " (") last line, for "assing," read, assigno.  
 81, Dele *note [2.]*  
 102, line 3, for "Jackson," read, Jackson.  
 106, line 14, for "mortgagee," read, mortgagor.  
 119, line 14, for "sufficient," read, sufficient.  
 140, line 25, for "where," read, were.  
 151, line 18, for "sufficient," read, sufficient.  
 " line 31, for "cbancellor," read, chancellor.  
 156, line 1, for "196," read, 156.  
 178 & 9, line 10, for "demised," read, demise.  
 233, line 13, for "how must now consider," read, now must consider how.  
 239, line 21, for "ejector," read, ejector.  
 " line 36, between the word "their" and the word "tenants," insert, being  
 243, line 24, for "Chalk," read, Calk.  
 247, line 16, for "Jackson," read, Jackson.  
 254, last line, for "Johnso," read Johnson.  
 267, (1st.) line 15, for "no," read, so.  
 " line 40, for "warrnty," read, warranty.  
 " (2d.) last line, for "hai," read, his.  
 272, (3d.) line 6, for "Evert," read, Covert.  
 285, (2d.) line 43, for "Joans," read, Johns. |  
 290, line 18, for "their," read, there.  
 295, last line, for "Serg. & L." read, Serg. & R.  
 307, note (u.) for "Bluck," read, Black.  
 333, note (h.) for "Davis, 1 Whit," read, Davies, Wight.  
 334, line 29, for "Burton," read, Benson.  
 335, third line from the bottom, dele "ex dem."  
 338 & 9, line 14, for "thoen," read, chosen.



# TREATISE

ON THE

## ACTION OF EJECTMENT.

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### CHAPTER I.

#### OF THE ORIGIN—PROGRESS—AND NATURE OF THE ACTION OF EJECTMENT.

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THE action of ejectment is a fictitious mode of legal proceeding, by which possessory titles to corporeal hereditaments and tithes, may be tried, and possession obtained, without the process of a real action.

The alterations which from time to time have taken place, in the nature and uses of the action of ejectment, form a remarkable and important branch of the changes effected in our general system of remedial law. From being a mere action of trespass to recover the damages sustained by a lessee for years, when ousted of his possession, it has gradually usurped the place of all the ancient remedies for the recovery of possessory rights to real property, and is at the present time the uni-

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[1] By the act of February, 1791, [of *South Carolina*,] the form of proceeding to recover land is changed into an action of trespass, to try titles; and Ejectment is no longer brought. *Lynch* ads. *Withers*, 2 *Bay's Rep.* 117, [in Note.]

"An Ejectment is almost the only action for trying the titles to Lands in this state," [*Pennsylvania*.] (*Per M'KEAN*, Ch. J.) *Morris' Lessee vs. Van Deren*, 1 *Dall. Rep.* 67.

By the "*Revised Statutes*" of *New-York*, Ejectment is substituted for all other actions to try claims respecting real property. Part 3, Chap. 5, Tit. 1, § 1 & 2, (Vol. 2, p. 303.)

"§ 1. The action of ejectment is retained, and may be brought in the cases and the manner heretofore accustomed, subject to the provisions herein after contained."

"§ 2. It may also be brought,

"1. In the same cases in which a writ of right may now be brought by

versal mode of trying possessory titles.[1] The alterations have, however, been effected by the most simple and natural means; and in tracing the remedy through its several gradations, it will be found [ \*2 ] continually moulding itself to the condition of the \*times, and extending its uses and powers, as the progress of civil society rendered necessary or convenient.

In the earlier periods of our history, estates for years, according to their present import, were unknown. Under the feudal system, war was the primary object even of legislation; and it is therefore by no means surprising that the interests of the inferior tenantry were in those times disregarded, and that the remedies for the recovery of lands were altogether confined to freehold titles, vested in the superior landholders.

The lords, indeed, seldom permitted their vassals to enjoy any interest in the lands they occupied, which could render them independent of their will; and, even when they did grant them a right to the possession for a determinate period, as a stimulus to increase their industry, such grants were not considered as transferring to the grantee any title to the land, but merely as agreements or contracts between the lord and his vassal.

The old writ of covenant, adapted at that time to the recovery of the term, as well as of damages, was the only remedy to which the tenants were entitled upon these leases. But this writ could only extend to cases in which there was a breach of the original contract, and the tenant was therefore altogether without means of redress, when dispossessed of his land by the act of a stranger, not claiming under the grantor. Great difficulties also attended the proceedings upon the writ

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"law, to recover lands, tenements or hereditaments; and by any person claiming an estate therein, in fee or for life, either as heir, devisee or purchaser :

"2. By any widow entitled to dower, or by a woman so entitled and her husband, after the expiration of six months from the time her right accrued, to recover her dower, of any lands, tenements or hereditaments."

Part 3, Chap. 5, Tit. 7, § 24, (Vol. 2, p. 343.)

"§ 24. All writs of right, writs of dower, writs of entry and writs of assize, all fines and common recoveries, and all other real actions known to the common law, not enumerated and retained in this chapter; and all writs and other process heretofore used in real actions, which are not specially retained in this chapter; shall be, and they are hereby abolished."

The real Actions "enumerated and retained in this chapter," are "Nuisance," and "Waste."

of covenant. It only lay between the immediate parties to the grant; and, as it frequently happened that the tenant was dispossessed by a person claiming under a subsequent feoffment from his grantor, and not by the grantor himself, he was then, notwithstanding [ \*3 ] the breach of the original contract, enabled to recover only damages for the injury he had sustained, but had no means of regaining possession of the land from which he had been ousted.(a)

So regardless, however, was the law during the first ages after the Conquest, of grants of this nature, that until the time of King Henry III. this writ of covenant remained the sole remedy for the grantee, even upon a breach of the grant. In that reign the first symptoms of a more enlightened policy appeared; and by the wisdom of the court and council, a full remedy was provided for a termor, who was dispossessed of his land, against all persons whatsoever, claiming under the title of the grantor.(a)

The writ invented for this purpose was, according to *Bracton*,(a) called the writ of *quare ejecit infra terminum*, and required the defendant to shew, wherefore he deforced the plaintiff of certain lands, which *A.* had demised to him for a term then unexpired, within which term the said *A.* sold the lands to the defendant, by reason of which sale the defendant ejected the plaintiff therefrom.

The language, indeed, used by *Bracton*,(a) when speaking of this writ, may at first sight induce an opinion, that it was intended as a general remedy against all persons, even strangers, who ejected a lessee; and this interpretation has been adopted by a learned writer on the English law.(b) On a minute investigation, however, it will appear, that *Bracton* meant only to include the grantor himself, or persons claiming under him. One passage certainly militates against this conclusion, "*Si autem alius quam qui tradidit ejecerit, si hoc fecerit cum AUTORITATE et VOLUNTATE tra-\*dentis, uterque tenetur hoc* [ \*4 ] *judicio, unus propter factum, et alius propter auctoritatem. Si autem sine VOLUNTATE, tunc tenetur ejector utrique, tam domino proprietatis, quam firmario: firmario per istud breve, domino proprietatis per assisam novæ disseysinæ, ut unus rehabeat terminum cum dampnis, et alius liberum tenementum suum sine dampnis.*" But the difficulty is re-

(a) *Bracton*, b. 4. f. 220.

(b) *Reeves Eng. Law*, Vol. I. p. 341.

moved by the next sentence, in which he says, "*Si autem dominus proprietatis tenementum ad firmam traditum alicui dederit in dominico tenendum, seysinam ei facere poterit SALVO FIRMARIO TERMINO SUO.*" And it seems, therefore, that in the latter clause of the passage first above cited, particularly from the omission of the word *autoritate* in it, *Bracton* only alluded to cases where the grantor had enfeoffed another, without intending thereby to injure his grantee, and such feoffee afterwards entered upon him. This interpretation is also most consistent with the spirit of the times in which *Bracton* wrote. It was then held that a man could not enter *vi et armis* into his own freehold, and the writ of *quare ejecit infra terminum* is not a writ of trespass *vi et armis*, which, if it had lain against those not having a title to the freehold, it naturally would have been. The old authorities(c) also, when [ \*5 ] de-\*scribing the nature and effect of this writ, invariably speak of it, as lying in those cases only where the ejector claims title under the grantor. A sale of the lands to the ejector is also stated in the body of the writ. And, indeed, if the interpretation here contended for be incorrect, it seems quite unaccountable, that, more than half a century after the time of *Bracton*, a new writ, namely, the writ of *ejectione firmæ*, which only gave the plaintiff damages, and did not restore the term, should have been invented for lessees against strangers, when one so much more beneficial was already in existence.

The writ of *quare ejecit* might be drawn either as a *præcipe*, or a *sit se fecerit securum*, and, when first invented, the *præcipe* was thought the better mode of proceeding, though in process of time, the latter became more generally used. It is, perhaps, from this circumstance that *Fitz-*

(c) Thus, in Hil. Term, 3 Edward I. "In *quare ejecit* plaintiff shall recover his term and damages by him sustained by reason of the sale." (Stat. Ab. tit. *qua. ejec.*) In the Reg. Brev. (p. 227.) "*Fuit hoc breve inventum per discretum virum Whilhelmum de Merton ut terminarius recuperet catalla sua versus proffatum.*" In a case in Hil. Term, 46 Edward III. 4. 12. per *Fulthorpe*, Justice. "If a stranger oust a lessee by reason of a *feoffment*, in that case he is put to his action upon the writ of *quare ejecit*," and in the same case, per *Finchden*, J. "In such case, at the common law, the lessee had no other writ but

his writ of covenant; and although by the law a special writ of *quare ejecit* is ordered against a stranger, a *feoffee*, nevertheless the lessee is not ousted of his writ of covenant against the lessor." This latter doctrine is exactly that laid down in *Bracton*. So, also, per *Choke*, J. (21 Edw. IV. 10. 20.) "*Quare ejecit*, &c. lieth where one is in by title, *ejectione firmæ* where one is by wrong;" and, per *totam curiam* (19 Henry VI. 56. 19.) "If a man lease for years, and sell to *F.* who ousts the termor, the lessee shall have a *quare ejecit*, and recover his term and damages."

*herbert(d)* has considered the invention of the writ to be posterior to the statute of *Westminster* the second.(e)

The plaintiff, by this writ, as by the old writ of covenant, recovered both his term and damages, if the term were unexpired, or his damages only in case of its expira-\*tion before the judgment; [\*6] but the great advantage he derived from it, was the power of proceeding against third persons, as well as against the original grantor.

Notwithstanding this favorable alteration, the farmer was still without remedy when dispossessed by a mere stranger, not claiming under his grantor. But an ouster by a stranger could then rarely happen; and if at any time the vassal was so dispossessed, he would throw himself on the protection of his lessor, abandon his own claim, and leave the lord to recover by a real action both the freehold and possession.

In process of time, however, the vassal demanded a remedy for himself, and in the reign of King *Edward* II. or in the early part of that of *Edward* III.(f) a writ was invented, which gave a lessee for years a remedy (though in some respects an imperfect one) against all persons whatsoever, who ousted him of his term; excepting, indeed, where the grantor himself ejected his lessee, and subsequently enfeoffed another, in which case, the old writ of *quare ejecit* was resorted to.

This new writ was a writ of trespass in its nature. The process upon it, as upon all other writs of trespass, was by attachment, distress, and process of outlawry. It called upon the defendant to show, wherefore, with force and arms, he entered upon certain lands which had been demised to the plaintiff for a term then unexpired, and ejected him from the possession thereof; and comprised all cases, with the single exception already mentioned, in\* which the second lessee, [\*7] coming into possession by means of a title, could not be said to

(d) The inaccuracy of Fitzherbert, when speaking of this writ, is remarkable. He considers its invention as posterior to the statute of *Westminster* 2. (13. Edw. I.) and as intended to remedy a partial evil, occasioned by the writ of *ejectione firmæ*. (F. N. B. 488.) Bracton, however, who wrote in the reign of Henry III. speaks of the writ as in use in his time, and as having been invented to remedy the inconveniences attendant on the old writ of covenant. In the Reg. Brev. (227.) also, the same reasons are given for its origin. The inaccuracy is evident also from another

circumstance, WALTER DE MARTON, called by Fitzherbert *William de Moreton*, and in the Reg. Brev. *William de Marton*, (the inventor of the writ,) was Chancellor in the reign of Henry III. (Dugdale's Chron.) and died in the sixth year of Edward I. (Matt. Westmon. p. 366) seven years before the statute of *Westminster* 2. was enacted.

(e) F. N. B. 468.

(f) The first recorded instance of an action of *ejectione firmæ*, in the 44th year of Edward III (Trin. 44 Edw. III. 22. 26.)



be a trespasser. Even the grantor was liable to be sued upon this new writ, notwithstanding the old doctrine, that a man could not enter *vi et armis* into his own freehold.(g) As, however, the plaintiff did not possess a freehold interest, his title to the lands was only so far acknowledged in this action, as to give him damages for the injury he had sustained, but not to restore to him the possession of his term.

It is upon this writ, though apparently so dissimilar from the present practice, that the modern remedy by ejectment is founded.

Whilst the feudal system continued in its vigour, and estates for years retained their original character, but little inconvenience resulted to tenants from this imperfect remedy. When, however, the feudal policy declined, and agriculture became an object of legislative regard, the value and importance of estates of this nature considerably increased, and it was necessary to afford to lessees for years a more effectual protection. It then became the practice for leaseholders, when disturbed in their possessions, to apply to courts of equity for redress, and to prosecute suits against the lessor himself, to obtain a specific performance of the grant, or against strangers for perpetual injunctions to quiet the possession; and these courts would then compel a restitution of the land itself to the party immediately injured.(h)

The courts of common law soon afterwards adopted this method of rendering substantial justice: not indeed by the \*invention of [8] a new writ, which perhaps would have been the best and most prudent method, but by adapting the one already in existence to the circumstances of the times; and introducing, in the prosecution of a writ of ejectment, a species of remedy neither warranted by the original writ, nor demanded by the declaration, namely, a judgment to recover the term, and a writ of possession thereupon.

It is singular, that neither the causes which led to this important change, nor the principles upon which it was founded, are recorded in any of the legal authorities of those times. It is difficult, if not impossible, to ascertain with accuracy the precise period when the alteration itself took place; although it certainly must have been made between the years 1455 and 1499, since, in the former year, it is said by one of the

(g) F. N. B. 505.

(h) Gilb. Eject. p. 2.

judges,(i) that damages only can be recovered in ejectment; and an entry of a judgment is still extant, given in the latter of those years, that the plaintiff in ejectment shall recover both his damages and his term.(k) It is said, indeed, in argument as early as the year 1458, that the term may be recovered in ejectment, but no reason is assigned for the assertion, nor is any decision upon the point on record until the time of the entry already mentioned.(l)

But whatever might be the causes which occasioned this alteration, the effects they produced were highly important. A new efficacy was given to the action of ejectment, the old real actions fell into disuse, and in the subsequent periods of our history, the ac- [9] tion of ejectment became the regular mode of proceeding for the trial of possessory titles.

That an action of ejectment, by means of this alteration in its judgment, might restore termors to possession who had been actually ejected from their lands, is sufficiently obvious; but it is not, perhaps, so evident how the same proceeding could be applicable to a disputed title of freehold, or why, as soon after happened, the freeholder should have adopted this novel remedy. No report of the case in which this bold experiment was first made is extant; but from the innumerable difficulties which attend real actions, it is not surprising that the freeholder should take advantage of any fiction which enabled him to avoid them; and as the Court of Common Pleas possessed an exclusive right of judicature in matters of real property, it is probable that the experiment originated in the Court of King's Bench, as an indirect method of giving to that Court a concurrent jurisdiction with the Common Pleas. But, however this may be, the experiment succeeded, and the uses of the action, as well as its nature, were changed.

When first the remedy was applied to the trial of disputed titles, the proceedings were simple and regular, different but little from those previously in use, when an ejectment was brought to recover the damages of an actual trespass. The right to the freehold could only be determined in an indirect manner. It was term which was to be recovered by the judgment in the action, and it was therefore necessary that a term should be created; and as the injury complained of in the writ was the loss of

(i) *Per Choke*, J. Mich. 33 Hen. VI. 42. 19.

(l) *Brooke's Ab. tit. Quare ejecit. folio 167.*

(k) *Rast. Ent. 2<sup>o</sup> (c)*

the possession, it was also necessary that the person to whom the term was given, should be ejected from the lands.

[\*10] \*In order to obtain the first of these requisites, namely, a term, the party claiming title entered upon the disputed premises, accompanied by another person, to whom, whilst on the lands, he sealed and delivered a lease for years. This actual entry was absolutely necessary; for, according to the old law of maintenance, it was a penal offence to convey a title to another, when the grantor himself was not in possession. And, indeed, it was at first doubted, whether this nominal possession, taken only for the purpose of trying the title, was sufficient to excuse him from the penalties of that offence.(m)

It is from the necessity of this entry, also, that the remedy by ejectment is confined to cases in which the claimant has a right to the possession. When only a right of property, or a right of action, remained to him, the entry would be illegal, and consequently not sufficient to enable the party making it to convey a title to his lessee: and as the principles of the action still remain the same, although its proceedings are changed, the right to make an entry continues to be requisite,[1] though the entry itself is no longer necessary.[2]

(m) 1 Ch. Rep. Append. 29.

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[1] Ejectment will not lie by a person already in possession of the premises. *Jackson ex dem. Clowes vs. Hakes*, 2 *Caines' Rep.* 335.

"Without a right of Entry the Plaintiff cannot recover in an action of 'Ejectment.'" *Colston vs. M'Vay*, 1 *Marsh. Rep. (Ky)* 251.

When a person recovers a judgment in ejectment, and neglects to enforce it within the period laid in his demise, his right of entry under that judgment is altogether gone; and if there have been an adverse possession for 20 years, during which such judgment was recovered, it will not avail him to take the case out of the Statute of Limitations. *Jackson ex dem. Beekman & Al. vs. Haviland*, 13 *Johns. Rep.* 229.

A lessor in Ejectment ought to have a subsisting title or interest in the premises. *Jackson ex dem. Starr & Uz. vs. Richmond*, 4 *Johns. Rep.* 483. *Jackson ex dem. Livingston vs. Sclover*, 10 *Johns. Rep.* 368.

An entry into part of a tract of land, with a claim to the whole, is equivalent to an entry into the whole. *Jackson ex dem. Gansevoort & Al. vs. Lunn*, 3 *Johns. Cases*, 109.

[2] In an action of Ejectment, it was held, that an actual entry was not necessary in any case, except to avoid a fine. *Jackson ex dem. Bronck vs. Cryslor*, 1 *Johns. Cas.* 125.

It is not necessary, to entitle the owner of land to recover in Ejectment, that he should prove, that he, or those under whom he claims, have been

The lessee of the claimant, having acquired a right to the possession, by means of the lease already mentioned, remained upon the

in possession within twenty-one years, [*The Time limited by the Laws of Pennsylvania.*] before bringing suit. Possession by operation of law, accompanies the title, unless the contrary is shewn, and until it is shewn.—*Hawk vs. Senseman and Others*, 6 Serg. & R. Rep. 21, 23. & *Vide*, *Clay vs. White & Others*, 1 Munf. Rep. 162.

A previous entry on the land is not necessary to enable the plaintiff to support his action: the action of Ejectment may be maintained, if the plaintiff *have a right to enter*. "The question is not whether he *has* entered, but whether he *may enter*." *Lessee of Rugge vs. Ellis*, 1 Bay's Rep. 107, 111. *Hylton's Lessee vs. Brown*, 1 Wash. Circ. Ct. Rep. 204.

The Plaintiff in Ejectment need not be in actual possession within seven years: if he has a title by deed or grant, he has a constructive possession by operation of law, which preserves his right of entry, until it be destroyed by an actual adverse possession, continued for seven years together; if he has never seen his land—if he has not entered upon it for fifty years, his title may be good, if his adversary hath not, been in possession for seven years continually, during the whole time with a colour of title. *Young vs. Irwin*, 2 Hayw. Rep. 11.

"In this country there is no necessity for an entry until an actual adverse possession commences, and that actual adverse possession must be continued for seven years without entry or claim on the other side, before it can toll the Plaintiff's right of entry. The contrary doctrine in this country would be attended with consequences very fatal to titles for land." *Den ex dem. Park vs. Cochran & Al.* 1 Hayw. Rep. 180. & *Vide Den ex dem. Slade vs. Smith*, *Ibid.* 249. *Taylor vs. Buckner*, 2 Marsh. Rep. (Ky.) 19.

In order to support even a writ of right, it is not necessary to prove an actual entry under title, or actual taking of esplees, a constructive seisin in deed is sufficient. *Green vs. Liler & Others*, 8 Cranch's Rep. 229.

The construction which would require an entry into lands, by the owner, within a limited time after the title accrued, unless there be some adversary title or possession to be defeated by such entry, "is totally inadmissible. How such an opinion could have been entertained is unaccountable. There is no foundation for it"—*Per MARSHALL, CH. J. delivering the Opinion of the Court*, in *Shearman vs. Irvine's Lessee*, 4 Cranch's Rep. 369.

It is not necessary, that either the lessor of the plaintiff or his ancestors should ever have had *actual* possession; *legal* possession or *Seisin in Law* is sufficient to sustain his suit. In *Jackson ex dem. Beekman vs. Sellick*, 8 Johns. Rep. 262, it was decided, that where a *feme covert* is the owner of wild and uncultivated land, she is considered in law, as in fact, possessed, so as to enable her husband to become a *tenant* by the curtesy—and KENT, CH. J. in delivering the opinion of the Court, among other things, said: "There was no *pedis possessio* or possession in fact, of the premises, in the popular sense of the words, by either *Matthews* or his wife during the coverture; for the lands continued vacant, or remained as new lands, wild and uncultivated, from the date of the patent in 1704, to the time of the commencement of the adverse possession in 1772. The title under the Patent "to an undivided eighth part of the premises, clearly existed in *Matthews' wife*. She derived it by will from her mother, who was one of the four co-heirs of *Henry Van Ball*. The question is, was she not to be considered

land, and then the person who came next upon the freehold, *animo possidendi*, or according to the old authorities, even by chance, (n) was

(n) 1 Lil. Prac. Reg. 673.

"as seised in fact of these premises, so as to enable her husband to become a tenant by the curtesy? To deny this, would be extinguishing the title of tenant by the curtesy, to all wild and uncultivated land. It has long been a settled point, that the owner of such lands is to be deemed in possession, so as to maintain trespass. The possession of such property follows the title and so continues, until an adverse possession is clearly made out. This is the uniform doctrine of this Court; and there is no reason why the same rule should not apply where the title by curtesy is in question." And after citing *Co. Litt.* 29. a.; *De Grey vs. Richardson*, 3 Atk. 469, and *Sterling vs. Penlington*, (7 Viner, 149. pl. 11. *Curtesy A.*) he adds; "These cases are as strong as the present, and prove that actual entry or *pedis possessio*, is not absolutely requisite, and that if the party is constructively seised in fact, it will be sufficient."—This case was cited and confirmed in *Jackson ex dem. Austin & Al. vs. Howe & Al.* 14 Johns. Rep. 406; and in *Jackson ex dem. Swartwout & Ur. vs. Johnson*, 5 Cow. Rep. 102, and in *Jackson ex dem. Woodruff & Al. vs. Glitchrist*. 15 Johns. Rep. 117.

But in the case of *Den ex dem. Johnson vs. Morris*, (2 Halstead's Rep. 6.) it was held, that the lessor of the plaintiff, in an action of ejectment, must always count upon and shew a possession of the Land within the time to which the right of entry is limited: viz. within twenty years next before the action is brought. But he need not shew a possession of twenty complete years, or of any other number of years, further than is necessary to constitute a full and peaceable possession. And the possession to be proved, being a mere matter in *pais*, may be shewn as well without deed as with it; though when without it, it will always be looked upon with greater jealousy, and be overcome with greater ease.

And in the case of *Clay vs. Ransome*, (1 Munf. Rep. 455.) The court said, "An ejectment is a possessory action, and only a competent remedy where the lessor of the plaintiff may enter: therefore it is always necessary for the plaintiff to shew that his lessor had a *right to enter*; by proving a possession within 20 years, or *accounting for the want of it* under some of the exceptions allowed by the statute."

But the same Court in the case of *Clay vs. White & Al.* (1 Munf. Rep. 162, 170.) said, (TUCKER, J. *delivering the Opinion of the Court.*) "Upon common law principles, then, I am of opinion that an actual entry into waste and unappropriated Lands granted by the Commonwealth is not necessary, in order to complete the patentee's title thereto; but that the same is, upon the delivery of the Patent, absolute and complete for every purpose whatsoever, whether to maintain an action, or to transmit an inheritance, or to grant the same by deed, or by last will and testament."—& *Vide, See vs. Greenlee*, 6 Munf. Rep. 303.

It seems, that the Statute of 21 Jac. 1. c. 16. did not extend to the Province of Maryland—*Lloyd's Lessee vs. Hensley*, 1 Har. & M'Hen. Rep. 28.—*Lee's Lessee vs. Bladen & Al.* Ibid. 30.—*Drane vs. Hodges*, Ibid. 518.

A deed of bargain and sale in New-Jersey, passed the possession, without any actual entry by the bargainee, and this possession the law presumes to continue, until the contrary is proved. *Lessee of Bayard vs. Colfax et Al.* c. a. v. s. n. J. April, 1821. M. S. (Cited in Cox's Digest, p. 555.)

accounted an ejector of the lessee, and a trespasser on his possession. A writ of trespass and ejectment was then served upon the ejector by the lessee. The cause regularly proceeded to trial as in the common action of trespass; and as the lessee's claim could [\* 11] only be founded upon the title of his lessor, it was necessary to prove the lessor's interest in the land, to enable the plaintiff (the lessee) to obtain a verdict. The claimant's title was thus indirectly determined; and, although the writ of possession must of course have been issued in the plaintiff's name, and not in his own, yet as the plaintiff had prosecuted the suit only as the lessor's friend, he would immediately give up to him the possession of the lands.

In the infancy of the experiment, this mode of proceeding could be attended with no ill consequences. As the party previously in possession, must, in contemplation of the law, be upon the lands, and certainly *animo possidendi*, the friend of the claimant was allowed to consider him as an ejector, and make him the defendant in the action. When, however, the remedy became more generally used, this simple method was found to be productive of considerable evil. It was easy for the claimant to conceal the proceedings from the person in possession, and to procure a second friend to enter upon the lands, and eject his lessee immediately after the execution and delivery of the lease. The lessee would then commence his suit against this ejector, and the party in possession might consequently be ousted of his lands, without any opportunity of defending his title. To check this evil, a rule of court was made, forbidding a plaintiff in ejectment to proceed against such third person, without giving a previous notice of the proceedings to the party in possession; and it was the practice for such party, on the receipt of this notice, if he had any title to the lands, to apply to the court for permission to defend the action; which application was uniformly granted, upon his undertaking to indemnify the defendant (the third person) from the expenses of the suit. The action, however, [\* 12] proceeded in the name of such defendant, though the person in possession was permitted at the trial to give evidence of his own title.

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It is declared unnecessary, by the "*Revised Statutes*" of New-York, Part 3, Chap. 5, Tit. 1, § 25 (Vol. 2. p. 306.)

" § 25. It shall not be necessary for the plaintiff to prove an actual entry under title, nor the actual receipt of any profits of the premises demanded; but it shall be sufficient for him to show a right to the possession of such premises, at the time of the commencement of the suit, as heir, devisee, purchaser or otherwise."

A considerable alteration in the manner of proceeding in the action was occasioned by this rule, although it was only intended to remedy a particular evil. It became the general practice to have the lessee ejected by some third person, since called the casual ejector, and to give the regular notice to the person in possession, instead of making him, as before, the trespasser and defendant. A reasonable time was allowed by the courts, for the person in possession, after the receipt of the notice, to make his application for leave to defend the action, and, if he neglected to do so, the suit proceeded against the casual ejector, as if no notice had been necessary.

The time when this rule was made is unknown, but as the evil it was intended to remove must soon have been discovered, it probably was adopted shortly after the remedy grew into general use.<sup>(o)</sup> It seems, also, to have been the first instance in which the courts interfered in the practice of the action, and is therefore remarkable as the foundation of the fictitious system by which it is now conducted.

In this state, with the exception of a few practical regulations, not necessary to be here noticed, the action of ejectment continued until the time of the commonwealth. Much trouble and inconvenience, however, attended the observance of the different formalities. If several persons were in possession of the disputed lands, it was neces-

sary to execute separate leases upon the premises of the  
 [\* 13] different tenants, and to commence separate actions upon the several leases.<sup>(p)</sup> Difficulties also attended the making of entries, and the action of ejectment had, by this time, grown into such general use, as to make these inconveniences sensibly felt. A remedy, however, was discovered for them by Lord Chief Justice *Rolle*, who presided in the Court of Upper Bench during the Protectorate; and a method of proceeding in ejectment was invented by him, which at once superseded the ancient practice, and has by degrees become fully adapted to the modern uses of the action.<sup>(q)</sup>

By the new system, all the forms, which we have been describing, are dispensed with. No lease is sealed, no entry or ouster really made; the plaintiff and defendant in the suit are merely fictitious names, and in

<sup>(o)</sup> *Fairclain, d. Fowler v. Shantille*, 402.  
 Burr. 1290—1297.

<sup>(p)</sup> Co. Litt. 262. *Argoll v. Chaney*. Palm.

<sup>(q)</sup> *Styles, Prac. Reg.* 108. (ed. 1687.)

fact all those preliminaries are now only feigned, which the ancient practice required to be actually complied with.[1]

An inquiry into the numerous regulations which have been made for the improvement of the modern practice, must be reserved for a future part of this work ; but it may be useful to give in this place a brief outline of the system, although a detailed account will be hereafter necessary.

*A.*, the person claiming title, delivers to *B.*, the person in possession, a declaration in ejectment, in which *C.* and *D.*, two fictitious persons, are made respectively plaintiff and defendant ; and in which *C.* states a fictitious demise of the lands in question from *A.* to himself for a term of \*years, and complains of an ouster from them by *D.* [\* 14] during its continuance. To this declaration is annexed a notice, supposed to be written and signed by *D.*, informing *B.* of the proceedings, and advising him to apply to the court for permission to be made defendant in his place, as he, having no title, shall leave the suit undefended. Upon the receipt of this declaration, if *B.* do not apply within a limited time to be made defendant, he is supposed to have no title to the premises ; and upon an affidavit that a declaration has been regularly served upon him, the court will order judgment to be entered against *D.*, the casual ejector, and possession of the lands will be given to *A.*, the party claiming title. When, however, *B.* applies, pursuant to the notice, to defend the action, the courts annex certain conditions to the privilege. Four things are necessary to enable a person to support an ejectment, namely, title, lease, entry, and ouster ; and as the three latter are only feigned in the modern practice, *C.* (the plaintiff) would be nonsuited at the trial if he were obliged to prove them. The courts, therefore, compel *B.* if made defendant, to enter into a rule, generally termed *the consent-rule*, by which he undertakes, that at the trial he will confess the lease, entry, and ouster, to have been regularly made, and rely solely upon the merits of his title ; and, lest at the trial he should break this engagement, another condition is also added, that in

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[1] “ § 6. The use of fictitious names of plaintiffs or defendants, and of “ the names of any other than the real claimants and the real defendants, “ and the statement of any lease or demise to the plaintiff, and of an eject- “ ment by a casual or nominal ejector, are hereby abolished.”—“ *Revised Statutes*” of *New-York*, Part 3, Chap. 5, Tit. 1, § 6, (Vol. 2, p. 304.)



such case he shall pay the costs of the suit, and shall allow judgment to be entered against *D.*, the casual ejector. These conditions being complied with, the declaration is altered, by making *B.* the defendant instead of *D.*, and the cause proceeds to trial in the same manner as in other actions.

The advantages resulting from this method are obvious: the [ \*15] claimant is exempted from the observance of useless \*forms, and the tenant admits nothing which can prejudice the real merits of the case.

It could not, indeed, be expected that a change so extensive, should, in the first instance, be entirely free from defects, nor that it would not, like other innovations, occasion some inconvenience when first introduced. For a few years after its invention, the courts seem occasionally to have been confused between the ancient and modern systems, and not to have established, so distinctly as might have been desired, the principles which were to regulate the proceedings they had so newly adopted. The action has however, now attained a considerable degree of perfection. Its principles are clearly understood, and its practice is reduced to a regular and settled system. The legislature has frequently interfered to correct its deficiencies. The courts continue to regard it with great liberality; and the remedy by ejectment is, at the present time, a most safe and expeditious method of trying possessory titles, unembarrassed by the difficulties attendant on real actions, and well adapted to the purposes of substantial justice.

## CHAPTER II.

OF WHAT THINGS AN EJECTMENT WILL LIE, AND HOW THEY ARE  
TO BE DESCRIBED.

By the common law, an ejectment will not lie for any thing, whereon an entry cannot be made, or of which the sheriff cannot deliver possession, [1] or, in other words, it is only maintainable for corporeal hereditaments. Thus, an ejectment will not lie for a rent, an advowson, a common in gross, or *pur cause de vicinage*, or any other thing which passes only by grant. Tithes, indeed, though an incorporeal inheritance, may be recovered by this action, but the right of maintaining an ejectment for them, does not arise from the common law, but is given by the provisions of the statute 32 Hen. VIII. c. 7.

It was formerly holden that an ejectment did not lie for a chapel, though a corporeal hereditament, because it was *res sacra*, and, therefore, not demisable; but this doctrine is now exploded, though, in point of form, a chapel should still be demanded as a *messuage*. (r)

(r) *Harpur's case*, 11 Co. 25,

(b). *Thyn v. Thyn*, Styles, 101. Doc. Plac. 291.

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[1] The general rule is, that an action of Ejectment will lie for any thing attached to the soil, of which the Sheriff can deliver possession.—*Jackson ex. dem. Saxton vs. May*, 16 John's. Rep. 184.

Wherever a right of entry exists, and the interest is tangible, so that possession of it can be delivered, an Ejectment will lie for it. *Jackson ex. dem. Loux. & Al. vs. Buel*. 9 John's. Rep. 298.

If the owner of land allows another to erect buildings upon it, under a contract that when the buildings are completed, he will either pay for them or convey the land at his election, Ejectment will lie upon *ouster* of the builder before such election is made. And if a creditor of him who owns the fee levy an execution on the land and do not include the buildings in the appraisement, Ejectment will lie by the creditor of the builder, who has levied an execution on any section of the buildings.—*King vs. Catlin*, 1 Tyler's Rep. 355.

Ejectment will only lie for things whereof possession may be delivered by the sheriff. *Black vs. Hepburne & Al.* 2 Yeates' Rep. 331.

A church may be also recovered in an ejectment when so demanded ;(s) and it is \*in one case said in argument, that after collation, ejectment will lie for a prebendal stall.(t)

A common, appendant or appurtenant, may be recovered in an ejectment, brought for the lands to which it is appendant or appurtenant, provided such right of common be mentioned in the description of the premises ; because, he who has possession of the land, has also possession of the common, and the sheriff, by giving possession of the one, executes the writ as to the other. But it may be prudent to state in the description, that the common so claimed is a common appendant or appurtenant, although it has been held after verdict, that an ejectment for lands, and also for "common of pasture," generally is sufficient.(u)

An ejectment will also lie for a boilary of salt, although by the grant of a boilary of salt, the grantee is only entitled to a certain proportion of the number of buckets of salt water drawn out of a particular salt water well ; for by the grant of a boilary of salt, the soil shall pass, inasmuch as it is the whole profit of the soil.(v)

Upon the same principle an ejectment may be maintained for a coal mine ; for it is not to be considered as a bare profit *apprender*, but as comprehending the ground or soil itself, which may be delivered in execution ; and though a man may have a right to the mine without any title to the soil, yet the mine being fixed in a certain place, the sheriff has a thing certain before him, of which he can deliver possession.(w)

[\* 18] \*In the old cases it is holden, that an ejectment will not lie for a fishery, because it is only a profit *apprender* ;(x) but it is said by *Ashhurst, J.*, in the case of *The King v. the Inhabitants of Old Arlesford*, (y) "there is no doubt but that a fishery is a tenement ; trespass will lie for an injury to it, and it may be recovered in ejectment."

But an ejectment will not lie for a water-course, or rivulet, though its

(s) *Hillingsworth v. Brewster*, Salk. 256.

(t) *The King v. The Bishop of London*, 1 Wils. 11. 14

(u) *Baker v. Roe*, Cas. Temp Hard. 127. *Newman v. Holdmyfast*, Stran. 54

(v) *Smith v. Barrett*, Sid. 161. S. C. 1 Lev. 114. Co. Litt. 4, (b)

(w) *Comyn v. Kinetio*, Cro. Jas. 180.—*Comyn v. Wheatly*, Nov. 121.

(x) *Molineaux v. Molineaux*, Cro. Jas. 144. *Herbert v. Laughlyn*, Cro. Car. 492.—*Waddy v. Newton*, 8 Mod. 275—277.

(y) 1 T. R. 858.

name be mentioned, because it is impossible to give execution of a thing which is transient, and always running. When, however, the ground over which the rivulet runs, is the property of the claimant, the rivulet may be recovered, by laying the action for "so many acres of land covered with water."<sup>(z)</sup> [1] An ejectment may be maintained for a pool, or pit of water, because those words comprehend both land and water.<sup>(a)</sup>

The owner of the soil may maintain an ejectment for land, which is part of the king's highway; because, though the public have a right to pass over it, yet the freehold and all the profits belong to the owner.<sup>[2]</sup> He must, however, \*recover the land, and the [\* 19] sheriff give possession of it, subject to the public easement.<sup>(b)</sup>

(z) *Challenger v. Thomas*, Yelv. 143.

(b) *Goodtitle, d. Chester, v. Alker*, Barr.

(a) *Ibid.* Co. Litt. 5, (b).

183. 145.

[1] If a grantor reserve to himself, his heirs and assigns, forever, "the right and privilege of erecting a mill-dam at a certain place described, and to occupy and possess the said premises without any hindrance or molestation from the grantee, or his heirs, &c." he has such an interest in the land reserved as will support an Ejectment. *Jackson ex. dem. Loux & Al. vs. Buel*, 9 Johns. Rep. 298.

But the grant of a privilege to erect a machine and building on land, without defining the place where they are to be erected, or the quantity of ground which is to be occupied, does not, without an actual entry and location, confer such a right as to enable the lessee to maintain Ejectment. *Jackson ex. dem. Saxten vs. May*, 16 Johns. Rep. 164.

[2] When a highway is laid out over the land of a private person, the public acquires no more than a right of way, or easement, and the title of the original proprietor still continues: He may use the land in any manner not inconsistent with the public right; is entitled to all mines, &c., and may maintain trespass or Ejectment in relation to it. *Jackson ex. dem. Yates & Al. vs. Hathaway*, 15 Johns. 447 & *Vide* to the same purport, *Cortelyou vs. Van Brundt*, 2 Johns. Rep. 357. *Whitbeck vs. Cook & Ux.* 15 Johns. Rep. 491. *Babcock vs. Lamb & Al.* 1 Cowen's Rep. 238. *Peck vs. Smith*, 1 Connect. Rep. 103.

"It was once doubted whether Ejectment or other real action would lie for the soil of a road or highway, because, it was said, full seisin could not be delivered; and a dictum of Lord Hardwicke was quoted to that effect in the case of *Goodtitle vs. Alker et. Al.* 1 Burr. 133; but that doubt was removed by the decision in that case; and very clearly it had no foundation in principle. And it was never doubted that the owner of the soil over which a highway was laid, could maintain trespass for an injury done to the soil." *Per WILDE, J. delivering the Opinion of the Court*, 6 Pickers. Rep. 59.

In the Case of *Stackpole & Al. vs. Healy*, (16 Mass. Rep. 35) PUTNAM, J., delivering the Opinion of the Court, said, "The principal question in-

An ejectment will lie *pro prima tonsura*, that is to say, if a man has a grant of the first grass which grows on the land every year, he may maintain ejectment against him who withholds it from him.(c) So also a demise of the hay-grass and after-math is sufficient to support an ejectment.(d) And the principle seems to be this, that the parties in these cases, being entitled to all the profits of the land for the time being, are entitled also for the same time to the land itself; and no man can enter thereon, whilst they are so entitled, without being a trespasser. But the ejectment should not be brought for the land generally, but for the first grass or after-math thereof as the case may be; although where the demise was for so many acres of pasture land, it was held sufficient for the lessor of the plaintiff, in the first instance, to show that he was entitled to the *prima tonsura* thereof, because the first grass being the most signal profit, the freehold of the land shall be esteemed to be in him who has it, until the contrary is shown.(e)

A right to the herbage will also be sufficient to support an ejectment, because, he who has a grant of the herbage, has a particular [\* 20] interest in the soil, although by such grant the \*soil itself does not pass. But the ejectment should be for the herbage of the land, and not for the land itself.(f)

(c) *Ward v. Petifer*, Cro Car. 362.

(d) *Wheeler v. Toulson*, Hard. 830.

(e) *Rez v. Inhabitants of Stoke*, 2 T. R. 451.

(f) *Wheeler v. Toulson*, Hard. 330.

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"tended to be presented in this case is, whether the People of this Commonwealth have a right to use the Lands for the purpose of grazing, which have been laid out as highways. I hold it to be clear, that the publick have no other right, but that of passing and re-passing; and that the title to the land, and all the profits to be derived from it consistently with, and subject to, the right of way, remain in the owner of the soil. The owner may maintain trespass for any injury done to the soil, which is not incidental to the right of passage acquired by the people. The land covered by a highway may be recovered in Ejectment"—& *Vide* to the same purport. *Alden vs. Murdock*, 13 Mass. Rep. 256. *Perley vs. Chandler*, 6 Ib. 456. *Commonwealth vs. Peters*, 2 Ib. 127. *Chambers vs. Furrys*, 1 Yeates' Rep. 167.

A public highway only vests in the Commonwealth a right of *passage*; but the *freehold* and the *profits*, (such as trees upon it and mines under it,) belong to the owner of the soil, who has a right to all remedies for the freehold, subject however, to the easement. *Bolling vs. The Mayor, &c. of Petersburg*, 3 Rand. Rep. 563.

But in the case of *Doe ex. dem. The Minister, &c. of the Parish of St. Julian, vs. Cowley*, (1 Carr & P.'s Rep. 123,) tried at the *Shrewsbury Assizes*, before Mr. Baron Hulloek, he *Held*, that Ejectment cannot be brought against a person for setting up a stall in a street. The remedy is an action of trespass by the owner of the soil.

In like manner an ejectment will lie for the pasture of a hundred sheep.(g)

But a right to the pannage is not enough, because pannage is only the mast which falls from the trees, and not part of the soil itself.(h)

With respect to the manner in which the disputed premises should be described in an ejectment, no determinate rule exists; nor is it easy to discover from the adjudged cases, any principle which can guide us on the subject. It is very frequently said, in general terms, that the description shall be *sufficiently certain*; but the degree of certainty required, particularly in the more ancient cases, seems to depend upon caprice rather than principle.[1] In the earlier stages of the remedy, when ejectments were compared to real actions, and arguments were drawn from analogy with them, a practice which obtained until after the reign of James I., much greater certainty was required than is now necessa-

(g) *Anony.* 2 Dal. 96.

(h) *Pemble v. Sterne*, 1 Lev. 212, 3. S. C. 1 Sid. 416.

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[1] The Plaintiff in an action of Ejectment, gave evidence that the Tract of Land called in the Patent, *Feltigraw's Fortune*, was also known by the name of *Felty's Fortune*, as it was called in the declaration in the cause. Held sufficient, and that Ejectment may be maintained for land by its reputed name. *Fouke & Al. vs. Kemp's Lessee*, 5 Harr. & Johns. Rep. 135.

If an Ejectment is brought for land by the name of A, which is covered by another tract called B, to which the Plaintiff makes title, can he recover? *Carroll & Al. Lessee vs. Norwood's Heirs*, 5 Harr. & Johns. Rep. 164.

The "Revised Statutes" of New-York, Part 3, Chap. 5, Tit. 1, §§ 7, 8 & 9 (Vol. 2, p. 304) contain the following provisions:—

"§ 7. It shall be sufficient for the Plaintiff to aver in his declaration, that on some day therein to be specified, and which shall be after his title accrued, he was possessed of the premises in question, describing them as herein after provided, and being so possessed thereof, that the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage, any nominal sum the plaintiff shall think proper to state."

"§ 8. In such declaration, the premises claimed, shall be described with convenient certainty, designating the number of the lot or township, if any, in which they shall be situated; if none, stating the names of the last occupants of lands adjoining the same, if any; if there be none, stating the natural boundaries, if any; and if none, describing such premises by metes and bounds; or in some other way, so that from such description, possession of the premises claimed, may be delivered."

"§ 9. If such plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in such declaration."

ry; and it appears, that when the action was first invented, as much certainty was requisite as in *a præcipe quod reddat*.(i) The courts, indeed, soon relaxed this severity, and allowed many descriptions to be sufficient in an ejectment, which would have been held too uncertain in a *præcipe*; as, for instance, an ejectment for a hop-yard was held good; so also for an orchard, though in a *præcipe* it should be de-  
 [\* 21] manded as a garden;(j) yet, notwithstanding \*this alteration, it was considered an established principle, until within the last fifty years, that the description must be so certain as to enable the sheriff exactly to know, without any information from the lessor of the plaintiff, of what to deliver possession.(k) [1] Amongst other salutary regulations, however, which the wisdom of modern times has introduced into this action, the abolition of the above-mentioned maxim may be reckoned; and it is now the practice for the sheriff to deliver possession of the premises recovered, according to the directions of the claimant, who therein acts at his own peril.(l)

Few cases are to be found in the modern books, wherein points respecting the certainty of description have arisen, and the authority of the old cases is very doubtful. The degree of certainty formerly required was much greater than is now necessary, and it is not improbable that many of the old decisions would be overruled, should they again come under the consideration of the courts.(m)

Lands will be sufficiently described by the provincial terms of the counties in which they lie. Thus, an ejectment may be maintained for "five acres of alder carr" in *Norfolk*:—alder carr, in that county, sig-

(i) *Macdunoch v. Stafford*, 2 Roll. Rep. 163.

(j) *Wright v. Whealley*, Noy, 37. S. C. Cro. Eliz. 854. *Royston v. Eccleston*, Cro. Jac. 654. S. C. Palm. 387.

(k) *Bindover v. Sindercombe*, 2 Raym. 1470. and the cases there cited.

(l) *Cottingham v. King*, Barr. 623. 630.—*Connor v. West*, Barr. 2672.

(m) *St. John v. Comyn*, Yelv. 117. *Cottingham v. King*, Barr. 623.

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[1] "The ancient rule required the description of the premises in the declaration to be so certain, that the Sheriff might know from his execution, exactly of what to deliver possession. The relaxation of that rule has opened the way to numerous and vexatious applications to correct the errors of the Sheriff in delivering possession; and the settled rule of the Supreme Court, where a general verdict is given for the plaintiff, is to restrict him to the taking possession of so much only, as he gave evidence of his title to on the trial." (*Per* SPENCER, SENATOR,) *Seward vs. Jackson ex. dem. Van Wyck*, (*In Error*) 8 Cowen's Rep. 427

There must be such a description of the land claimed in an action of Ejectment, as will enable the Sheriff to deliver possession after judgment. *Fenwick's vs. Floyd's Lessee*, 1 Har. & Gill's Rep. 172.

nifying land covered with alders. So, also, in *Suffolk*, for a beast-gate; and in *Yorkshire*, for cattle gates.(n)

The same principle applies to ejectments in *Ireland*, and terms used in that country will be sufficiently certain, when writs of error are brought therefrom in this kingdom. \*Thus, an [\* 22] ejectment will lie in *Ireland*, for a township, for a kneave,(o) or quarter of land, or for so many acres of bog or of mountain,(p) the word mountain being in that kingdom, rather a description of the quality, than the situation of land.(q)

But an ejectment in *England* for a hundred acres of mountain, or a hundred acres of waste, has been held to be bad for uncertainty, because both waste and mountain comprehend in *England* many sorts of land.(r)

It is no objection to a description that the premises are twice demanded in the same demise.(s)

An ejectment will not lie for a tenement, [1] because many incorporeal hereditaments are included in that appellation,(t) and, therefore, the description is not certain enough; nor will an ejectment lie for a messuage or tenement, for the signification of the word tenement being more extensive than that of the word messuage, it is not sufficiently certain what is intended to be demanded in the ejectment.(u) It is also holden that an ejectment will not lie for a messuage and tenement.(v)[2]

(n) *Barnes v. Peterson*, Stran. 1063. *Bennington v. Goodtitle*, Ib. 1084.

(o) *Coltingham v. King*, Burr. 623. 630.

(p) *Barnes v. Peterson*, Stran. 1063. *Bennington v. Goodtitle*, Ib. 1084.

(q) *Kilders v. Fisher*, Stran. 71. *vide cont. Macdonogh v. Stafford*, Palm 100 S C. 2 Roll. Rep. 139. *St. John v. Comyn*, Yelv. 117.

(r) *Hancock v. Price*, Hard. 57.

(s) *Warren v. Wakeley*, 2 Roll. Rep. 482.

(t) *Goodtitle v. Walton*, Stran. 824. *Copleston v. Piper*, Ld. Raym. 191.

(u) *Ashworth v. Stanley*, Styl. 364. *Wood v. Payne*, Cro. Eliz. 186. *Rochester v. Rickhouse*, Pop. 208.

(v) *Doe, d. Bradshaw, v. Newman*, 1 East, 441. and the cases there cited. In the case of *Goodright d. Welsh v. Flood*, (3 Wils,

[1] The word *Tenement* in a declaration is sufficiently certain—*Den. ex dem. Osborne vs. Woodson*, 1 Hayw. Rep. 24.

[2] On error to reverse a judgment for the plaintiff in ejectment, which was brought for a messuage and tenement :

*Per Curiam*. "It is a settled rule that if the same count contains two demands or complaints, for one of which the action lies, and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts. That being so, there is no ground for reversing the judgment in question." Judgment affirmed. *Doe, dem. Lawrie et Al. vs. Dyeball*, 3 Barnw. & Cress. Rep. 70.



[\* 23] \*But an ejectment for a messuage or tenement, with other words expressing its meaning, is good, as a messuage or tenement called the *Black Swan*; for the addition reduces it to the certainty of a dwelling-house.(w)

So also an ejectment for a messuage or burgage, is good; because both signify the same thing in a borough.(x)

An ejectment for four corn mills, without saying of what kind, whether wind-mills, or water mills, is good; for the precedents in the register are so.(y)

An ejectment will lie for a stable and cottage,(z) and also for a house; though in a *præcipe* it ought to be demanded by the name of a messuage.(a)

Ejectment of a place called a passage-room is certain  
[\* 24] \*enough.(b) So also of a room, and of a chamber in the second story.(c) In like manner it has been held that an ejectment for "part of a house in *A.*" is sufficiently certain.(d) So also of "a certain place called the vestry."(e)

It has formerly been holden that ejectment for a kitchen could not be supported; because, although the word be well enough understood in common parlance, yet, as any chamber in a house may be applied to

28.,) in which a motion was made to arrest the judgment, because the plaintiff had declared of a messuage or tenement, the Court endeavoured to get over the objection, and took time for consideration, but ultimately thought themselves bound by the adjudged cases and reluctantly arrested the judgment. Afterwards in *Doe, d. Stewart, v. Denton*, (1 T. R. 11.,) on a similar application, where the plaintiff had declared for a messuage and tenement, the Court refused to grant the rule, *Buller, J.* saying, he remembered a case where a messuage or tenement had been held sufficiently certain. But this case was afterwards overruled, in *Doe, d. Bradshaw, v. Plowman*, (1 East, 441.,) "for that it passed by surprise, and was not law, being contrary to adjudged cases." The point is therefore now at rest, although, from the more recent case of *Goodtitle, d. Wright, v. Otway*, (8 East, 337.) the defendant is precluded from deriving any advantage from such error in description. In that case, the plaintiff had declared for a mes-

suage and tenement, and the verdict was entered generally; but the Court permitted the lessor (pending a rule nisi to arrest the judgment for the uncertainty) to enter the verdict according to the Judges' notes for the messuage only, and that without releasing the damages.

(w) *Barbery v. Yeomans*, 1 Sid. 295.

(x) *Danvers v. Wellington*, Hard. 173... *Rockester v. Rickhouse*, Pop. 203.

(y) *Fitzgerald v. Marshall*, 1 Med. 90.

(z) *Hill v. Giles*, Cro. Eliz. 818. *Lady Dacres' case*, 1 Lev. 58. *Hamond v. Ireland*, Sty. 215.

(a) *Royston v. Eccleston*, Cro. Jac. 654 S. C. Palm. 337.

(b) *Bindover v. Sindercombe*, Ld. Raym. 1470.

(c) *Anony*. 3 Leon. 210.

(d) *Sullivan v. Seagrave*, Stran. 695.—*Rawson v. Maynard*, Cro. Eliz. 286.

(e) *Hutchinson v. Fuller*, 3 Lev. 95

that use, the sheriff has not certainty enough to direct him in the execution, and the kitchen may be changed between judgment and execution ; but this reasoning does not correspond with the maxims of the present day.(f)

An ejectment will not lie for a close,(g) nor for the third, or other part of a close, nor for a piece of land, unless the particular contents, or number of acres, be specified.(h) From the old authorities, it seems also formerly to have been holden, (though the point is certainly somewhat obscure,) that the addition of the name of the close, without mention of the number of acres, would be bad ; though such a description, it is conceived, would now be deemed sufficiently certain.(i)

In ejectment for land, the particular species should be \*men- [\* 25] tioned in the description, whether *pasture*, *meadow*, &c. because land, in its legal acceptation, signifies only *arable* land.(j)

An ejectment for ten acres of underwood has been held good ;(k) because underwood is so well understood in law, that the sheriff has certainty enough to direct him in the execution.

"Fifty acres of gorse and furze"(l) has been held sufficiently certain in an ejectment, without specifying the particular quantity of each : so also "fifty acres of furze and heath," and "fifty acres of moor and marsh."(m)

An ejectment for "ten acres of pease" has been held to be certain enough, as signifying the same with ten acres of land covered with pease.(n)

It seems that an ejectment may be brought for a manor, or a moiety of a manor, generally, without any description of the number of acres, or species of land contained therein, and that under such general description the jury may find a verdict for the plaintiff, for a messuage, or for so many acres "parcel of the said manor,"[1] and for the defendant,

(f) *Ford v. Lerts*, Noy. 109.

(g) *Savel's case*, 11 Co. 55. *Hammond v. Savel*, 1 Rol. Rep. 55. *Knight v. Syme*, Balk. 254, *Joane v. Hoel*, Cro. Eliz. 205.

(h) *Palmer's case*, Owen 18. *Martyn v. Nichols*, Cro. Car. 578. *Jordan v. Cleabourne*, Cro. Eliz. 389. *Pemble v. Sterne*, 1 Lev. 212.

(i) *Lady Dacres' case*, 1 Lev. 58. *Savel's case*, 11 Co. 55. *Knight v. Syme*, 1 Balk.

254. *Royston v. Eccleston*, Cro. Jac. 654—*Jordan v. Cleabourne*, Cro. Eliz. 389. *Wythe v. Sparrow*, Cro. Jac. 435.

(j) *Massey v. Rice*, Cowp. 346, 349. *Savel's case*, 11 Co. 55.

(k) *Warren v. Wakeley* 2 Roll. Rep. 482.

(l) *Fitzgerald v. Marshall*, 1 Mod. 90.

(m) *Conner v. West*, Barr. 2672.

(n) *Odingsall v. Jackson*, 1 Brown, 143.

[1] A declaration in ejectment claiming 251 acres, part of a tract of

for the residue of the manor; but it is said in the old cases, not to be safe to bring an ejectment for a manor, without describing the quantity and species of the land.(o)

[\* 26] \*When an ejectment is brought for tithes, (p) the particular species of tithe demanded, should be specified in the declaration, as of hay, wheat, &c. or the description will be bad for uncertainty;(q) but it is not also necessary to mention the precise quantity of each species, because tithe is in its nature uncertain, the quantity entirely depending on the fruitfulness of the season; and it is, therefore, enough to say, "of certain tithes of hay, wool, &c."(r)

In an old case, where the plaintiff declared on a lease for tithes in *R.*, belonging to the rector of *D.*, and that the defendant entered upon him, and took *such* tithes severed from the nine parts in *R.*, without saying that the tithes so taken belonged to the rectory of *D.*, the description was held ill, because it did not confine the ouster to the tithes laid in the declaration; for the defendant might have ousted the plaintiff of tithes in *R.*, which did not belong to the rectory of *D.*(s)

In an ejectment brought in the county of *Durham*, the plaintiff declared "for coal mines in *Gateside*," generally, not specifying the particular number; and it appearing, upon a writ of error, that such was the customary mode of declaring in the county, the judgment for the plaintiff was affirmed.(t)

[\* 27] \*If a person eject another from land, and build thereon, it is sufficient if the owner bring his ejectment for the land, without mentioning the building, except where the building is a messuage, and then perhaps it ought to be particularly named.(u)

(o) *Warden's case*, Hot. 146. *Cole v. Aylett*, Litt. Rep. 299, 301. *Hens v. Stroud*, Latch. 61.

(p) It was once contended, that in an ejectment for tithes, the ejection should be laid, "of the rectory, or chapel, and of the tithes thereunto appertaining," for, that the plaintiff could not have a writ of *habere facias possessionem* of the tithes only: but the objection was overruled. *Baldwin v. Wine*, Cro. Car. 301.

(q) *Harpur's case* 11 Co. 25.(b). *Warrall v. Harper*, 1 Roll. Rep. 65, 68. *Dyer* 84, 5.

(r) *Anony. Dyer*, 116,(b).

(s) *Baldwin v. Wine*, W. Jones, 321, *tamen quare*, et vide *Goodright*, d. *Smallwood v. Strother*, Blk. 706.

(t) *Whittingham v. Andrews*, 4 Mod. 143. S. C. 1 Show. 364, S. C. Salk. 255. S. C. Carth. 277 S. C. Comb. 201.

(u) *Goodtitle*, d. *Chester*, iv. *Alker*, Burrj 123, 144.

land called, &c. without any description of the part claimed, and a writ of possession in conformity, are both defective. *Fenwick vs. Floyd's Lessee*, 1 Har. & Gill's Rep. 172.

## CHAPTER III.

OF THE TITLE NECESSARY TO SUPPORT THE ACTION OF  
EJECTMENT.

THE modern action of ejectment is the most simple and ready mode of trying every species of possessory title; and nearly all the minute and perplexing distinctions with which our laws of real property abound, are to be found in cases where this form of action has been adopted. A full inquiry into all the points discussed in these cases, would render this treatise far too voluminous for practical purposes, and, indeed, would be foreign to its design, which is to treat of the remedy by ejectment, and not of the laws of real property; whilst, on the other hand, an enumeration only of the different titles sufficient to support an ejectment, would be of little service either to the student or practitioner. It is intended, therefore, to keep a middle course, first discussing the general principles upon which the remedy is founded, and afterwards stating in succession the various persons, who, from the nature of their several estates, are entitled to maintain the action; pointing out the leading cases under each separate title, but leaving the more minute distinctions to those publications, which treat expressly of the laws of real property.

As the party in the possession of property is presumed to be the owner of the same, until the contrary is proved, [1] \*it is [\* 29]

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[1] A judgment for the plaintiff in ejectment, generally terminates all presumption in favour of the defendant's title, arising from prior possession. *Jackson vs. ex dem. Hills vs. Tuttle*, 9 Cowen's Rep. 233.

Possession of land by a party claiming it as his own in fee, is *prima facie* evidence of his ownership and seisin of the inheritance. *Ricard vs. Williams*, et Al. 7 Wheat. Rep. 59.

But possession alone, unexplained by collateral circumstances, evidences no more than the mere fact of present occupation by right; the law will not presume a wrong, and a mere possession is just as consistent with a present interest under a lease for years or for life as in fee. It must depend on the collateral circumstances what is the quality and extent of the interest claimed by the party: And to that extent only will the presumption of law go in his favour. The declarations of the party while in possession, equally with his acts, must be good evidence for this purpose. If he

necessary for a claimant in ejectment to show in himself a good and sufficient title[1] to the land, to enable him to recover them

claims only an estate for life, and that is consistent with his possession, the law will not, upon the mere fact of his possession, adjudge him to be in under a higher right or a larger estate. *Ricard vs. Williams, et Al.* 7. *Wheat. Rep.* 105, 106.

If a party be in under title, and by mistake of law, supposes himself possessed of a less estate, in the land than really belongs to him, the law will adjudge him in possession of, and remit him to his full right and title. For a mistake of law shall not in such case prejudice the right of the party, and his possession therefore must be held co-extensive with his right. *Ricard vs. Williams, et Al.* 7 *Wheat. Rep.* 106.

Possession ought not to be ousted without a clear title in the plaintiff, especially where it has been upheld by the state tribunals. *Preston's Heirs vs. Bowmar*, 6 *Wheat. Rep.* 580.

Where there is an ambiguity in the title under which the plaintiff in ejectment claims, it ought not to receive the broadest construction against a party in actual possession under a legal title. *Preston's Heirs vs. Bowmar*, 6 *Wheat.* 582.

Actual possession is *prima facie*, evidence of a legal title. *Jackson ex dem. Stewart vs. Town*, 4 *Cowen's Rep.* 602.

In Ejectment, possession, accompanied with a claim of ownership in fee is *prima facie* evidence of such an estate. In such case it is not the possession alone, but that it is accompanied with the claim of the fee, which gives this effect by construction of law to the acts of the parties. *Jackson ex dem. Sparkman. vs. Porter*, 1 *Paine's Rep.* 457.

But such effect is limited to the claim actually made and a claim of a different kind cannot afterwards be set up for the purpose of aiding the first. *Ibid.*

As where one claimed a title by an Indian deed, confirmed by an agent of the British government, who could not lawfully have confirmed it; it was held that no other deed, and no other kind of confirmation could be set up to help the possession, and that any presumption of the existence of a deed was to be confined to such a one as was originally asserted. *Ibid.*

[1] Where *A.* owned a patent, and *B.* owned another patent, adjoining; and, in the location under their respective patents, *A.*, by a mistake in locating, curtailed his patent on the side of *B.*, in consequence of which, *B.*, though he located, at first, on the true line, afterwards claimed up to *A.*'s location, and deeded a supposed gore between the patents; Held, that *A.* was not concluded in action of Ejectment, but might recover against one claiming a part of the supposed gore under the title of *B.* *Jackson ex dem. Gilliland & Al. vs. Woodruff & Al.* 1 *Cowen's Rep.* 276.

And, though *A.* actually give conveyances of his land, according to such mistaken location he will not be concluded in relation to any persons other than those to whom he has thus conveyed. *Jackson ex dem. Gilliland & Al. vs. Woodruff & Al.* 1 *Cowen's Rep.* 276.

If . convey to *B.* and afterwards convey or release the same land to *C.*, who is in possession, and an action of Ejectment is brought against *C.*, on the

from the defendant. He will not be assisted by the weakness of the

demise of *A. & B.*, the plaintiff cannot recover on the demise of *A.* who is estopped by the subsequent deed to *C.*; and if the deed to *B.* were void, by reason of an adverse possession he must also fail on that demise. *Jackson ex dem. Lathrop & Al. vs. Demont*, 9 Johns. Rep. 55. *Same Point, Jackson ex dem. Bonnel vs. Wheeler*, 10 Johns. Rep. 164.

The plaintiff in Ejectment relied on a judgment in partition only, and that being void, it was held, that he could not recover in such case, his undivided share, without deducing a regular title, as if no such judgment of partition had been entered. *Jackson ex dem. Antell & Ux. vs. Brown*, 3 Johns. Rep. 459.

Where the plaintiff, in an action of Ejectment, commenced in 1809.—Showed title by a release, made in 1767 in partition, to eighteen twentieths of the premises in question, and proved by witnesses, that all the lots in the patent so divided, with which they were acquainted, were held agreeably to that partition, and no outstanding title in the two remaining patentees appearing; Held, that it might legally be inferred that the lessor had a perfect title to the whole. *Doe ex dem. Clinton & Al. vs. Campbell*, 10 Johns. Rep. 475.

Where by an act of the Legislature, passed 6th of April, 1792, the Surveyor General was authorised to sell such lands of *W.* as *C.* should discover to have become forfeited by the attainer of *W.*; under the act of October, 1779, and pay the money arising from such sale to the Treasurer. &c., out of which the Treasurer was to pay the demand of *C.* against *W.*; and the Surveyor General sold all the estate of *W.* in a certain lot of land; in an action of Ejectment by a person under the deed of the Surveyor General, it was held, that the act of the Legislature, and the deed of the Surveyor General, were *prima facie* evidence of title sufficient to enable the plaintiff to recover. *Jackson ex dem. Wickham vs. Belknap*, 12 Johns. Rep. 96.

A title derived from the grant of a foreign government, is void. *Jackson ex dem. Winthrop vs. Waters*, 12. Johns. Rep. 365.

In an action of Ejectment by a purchaser under a sheriff's sale on execution, to recover the possession of the land, the plaintiff must produce not only the sheriff's deed and the execution; but an exemplification of the judgment on which the execution issued. *Jackson ex dem. Sleight vs. Hasbrouck*, 12 Johns Rep 213.

A fine and five years non-claim are conclusive evidence of title in the cognizee against all persons not under any legal disability; and a fine alone is sufficient to support an action of Ejectment against a person who has entered during the five years without title. *Jackson ex dem. Watson vs. Smith*, 13 Johns. Rep. 426.

Where several persons are devisees and tenants in common of land which is sold by two of the executors and devisees, under a power in the will of the deviser, and, afterwards, one of the executors and devisees who made the sale, purchases from the grantee, and takes a conveyance of the lands to himself absolutely, the title becomes vested in him solely; and his declarations that he held in common with his co devisees are insufficient to entitle them to recover a portion of the land as tenants in common with him. *Jackson ex dem. King vs. Burtiss & Al.* 14 Johns. Rep. 391.

A purchaser at a Sheriff's sale of all the right and title of a mortgagor in possession, is entitled to recover in Ejectment against the mortgagor

defendant's claim.[2] The possession of the latter, gives him a right

though the mortgagee was made a co-defendant, and the mortgage was outstanding. *Jackson ex dem. Randall vs. Davis*, 18 Johns. Rep. 7.

Though the exemplification of the record of the judgment stated that it was filed and docketed on the 22d of May; and the execution directed the Sheriff to levy on lands of which the defendant was seised on the 2d of May; and the clerk of the Court certified that there was a mistake in the exemplification; and that the record was in fact filed on the 2d of May; *Held*, that the error in the exemplification produced at the trial, was not sufficient to affect or defeat the plaintiff's title. *Jackson ex dem. Randall vs. Davis*, 18 Johns. Rep. 7.

C. who derived his title from E. of a lot of ground of 60 acres mortgaged the whole to E., who afterwards sold and conveyed six acres, part of the lot, in fee to B.; *Held*, that C. the mortgagor, might maintain Ejectment against B., the grantee of the mortgagee. *Jackson ex dem. Curtiss vs. Bronson*, 19 Johns. Rep. 325.

To warrant one's being made a lessor in Ejectment, he must have a claim to a subsisting title or interest in the premises. *Jackson ex dem. Colden & Al. vs. Paul*, 2 Cowen's Rep. 502.

It is not enough that it may be a question on the trial whether the legal title is not vested in him. *Jackson ex dem. Colden & Al. vs. Paul*, 2 Cowen's Rep. 502.

A defendant in Ejectment, who shows no title cannot take exceptions to imperfections in the plaintiff's title. *M<sup>r</sup> Allister vs. Williams*, 1 Tenn. Rep. 107.

A mere possessor sued in Ejectment will not be permitted to go into proof, showing that a *mesne* conveyance under which the plaintiff claims was forged, the conveyance having been proved and recorded. *Waterhouse vs. White*, 2 Tenn. Rep. 334.

If the lessor had no title to enable him to make the lease, or if he have parted with his title though to the lessee himself, the action cannot be supported. *Bates ex dem Shattuck vs. Tucker*, *Chipman's Rep.* 73.

In Ejectment the plaintiff in deducing his title must show a grant of the land, and a regular title from the grantee, or seisin of the land, for which the Ejectment was brought and a dying seized of the person under whom the lessor of the plaintiff derives his title, and a regular title from the person dying seized, or twenty years uninterrupted and exclusive possession of the land. *Plumer & Al. vs. Lane & Al.* 4 Har. & M<sup>rs</sup> Hen. 72.

"§ 3. No person can recover in ejectment, unless he has at the time of commencing the action, a valid subsisting interest in the premises claim-

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[2] "It is a settled doctrine, that the lessor of the Plaintiff in Ejectment must recover on the strength of his own title, and not on the weakness of his adversary's." (*Per* BOYLE, CH. J., *delivering the Opinion of the Court.*) *Colston vs. M<sup>r</sup> Kay*, 1 Marsh. (Ky.) Rep. 251.

In Ejectment a plaintiff must recover on the strength of his own title and not on the weakness of the defendant's. But a defendant cannot avail him-

against every man who cannot establish a good title; and if he can answer a *prima facie* case on the part of the lessor of the plaintiff, by shewing the real title to the land to be in another, it will be sufficient

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"ed, and a right to recover the same, or to recover the possession thereof, "or of some share, interest or portion thereof, to be proved and established at the trial."—"Revised Statutes" of New-York Part 3, Chap. 5. Tit. 1. § 3 (*Vol. 2 p. 303*)

In *Pennsylvania*, if the Plaintiff's title is founded upon a warrant only, without survey or purchase money paid, it is insufficient to entitle him to recover. *Lessee of Vanhorn vs. Chemut*, 2 *Wash. Circ. Ct. Rep.* 166.

Payment of part of the purchase money for land, a survey, and taking possession, clearing and building a house by the purchaser, give a title though the contract be by parol. *Smith vs. Lessee of Patton*, 1 *Serg. & R. Rep.* 60.

It is a general rule that where a contract has been made for the purchase of land, the purchaser shall not recover possession till he has paid or tendered the purchase money. *Ibid.*

*Query*, whether this must be done previous to the commencement of the Ejectment. *Ibid.*

If the vendor be the executor of the vendee, and retain effects equivalent to the purchase money, such tender or payment need not be made. *Ibid.*

If the plaintiff in Ejectment have not a regular paper title it is sufficient if he show a *right of entry*. *Lessee of Milligan vs. Dickson*, 1 *Peter's Circ. Ct. Rep.* 435, (in note.)

In Ejectment against any other than the proprietary or one claiming under him, it is not necessary for the plaintiff to show the title out of the proprietary, if a right of entry is proved. *Hylton's Lessee vs. Brown*, 1 *Wash. Circ. Ct. Rep.* 204.

In order to recover in Ejectment, the plaintiff must prove, first that he had title at the time of the demise laid, and secondly that the defendant was in possession at the time the suit was brought. *Bailey & Al. vs. Fairplay, Lessee, &c.* 6 *Binn. Rep.* 454.

An agreement by the lessor of the plaintiff for the sale and conveyance of the land to the defendant cannot be given in evidence in a trial at Law in the Circuit Court, as it is at most only evidence of an equitable title. *Lessee of Willink vs. Miles*, 1 *Peter's Circ. Ct. Rep.* 429.

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self of this rule against a plaintiff whom he has fraudulently induced to purchase a weak title. *Lane & Al. vs. Reynard*, (IN ERROR) 2 *Serg. & R. Rep.* 64. CONTRA. *Lessee of Walker vs. Coulter Addis*. *Rep.* 390.

The plaintiff in Ejectment cannot recover on the weakness of the defendant's title; he must show title in himself. *Covert v. Irwin*, 3 *Serg. & R. Rep.* 283. *Lessee of Walker vs. Coulter, Addis*. *Rep.* 390. *Lane vs. Reynard*, 1 *Serg. & R. Rep.* 65.



for his defence, without also proving that he holds the lands with the consent, or under the authority of the real owner. (v)[3] And [\* 30] the case will \*not be varied, although the lessor can prove that he has previously been himself in possession of the

(v) *Roe, d. Haldane, v. Harvey*, 4 Burr. 2484.

[3] An outstanding title must be a present, subsisting and operative one; otherwise the presumption will be, that it has become extinguished.—*Jackson ex. dem. Klock vs. Hudson*, 3 Johns. Rep. 375. SAME POINT, *Jackson ex. dem. Dunbar & Al. vs. Todd*, 6 Johns. Rep. 257.

And if the plaintiff show a good title, the presumption of the extinguishment of the outstanding title, ought to be liberally indulged. *Jackson ex. dem. Klock vs. Hudson*, 3 Johns. Rep. 381.

Though the defendant *forcibly* entered and took possession, he is not precluded from setting up a title in himself, or a third person, in bar of the action. (*Per SPENCER, C. J.*) *Jackson ex. dem. Seeley vs. Morse*, 16 Johns. Rep. 200.

A Defendant in Ejectment may defend himself by showing an elder outstanding patent for the Land, than that under which the Plaintiff claims.—*Colston vs. M'Kay*, 1 Marsh. Rep. (Ky.) 251.

Where upwards of twenty years of adverse possession have run against an out-standing title, it cannot be set up as a bar, for the presumption is, that it is no longer a subsisting title. *Jackson ex. dem. Duncan & Al. vs. Harder*, 4 Johns. Rep. 202.

A claim or title which could not be set up by a person while in possession, cannot be set up by another person who comes into possession under him. *Jackson ex. dem. Duncan & Al. vs. Harder*, 4 Johns. Rep. 202.

A mere trespasser shall not be permitted to show a title in a third person in opposition to the title of the plaintiff in Ejectment; and where the defendant is permitted to set up a title in a third person, the plaintiff having first shown a *prima facie* good title in himself at the time of bringing the action, may show that since issue joined, he has procured the title of such third person *Perryman's Lessee vs. Callison*, 1 Tenn. Rep. 515.

A mere trespasser or intruder cannot protect himself by setting up an out-standing title in a stranger. *Jackson ex. dem. Duncan & Al. vs. Harder*, 4 Johns. Rep. 202.

A. in 1770, being indebted to B. by three several Bonds, executed a Mortgage, including the premises in question, and covenanted that on default, the Mortgagee, his heirs, &c. might enter; in 1771, the Mortgage had become forfeited, and a judgment had also been recovered by B, against A, which was revived in 1775, and in 1778, under which the premises in question were sold to C., (who also derived title from the heirs and devisees of B.,) from whom the Defendant claimed title, but the validity of the Sheriff's deed was questionable; in an action of Ejectment by persons claiming under B.; *Held*, that although the mortgage was forfeited as long ago as 1771, it was still outstanding, the presumption of payment be-

[\*31] premi-<sup>s</sup>es. Thus, where a lease, made by a rector, was rendered void by his non-residence, his lessee was not allowed to

ing rebutted by the proceedings had to revive the Judgment, (which Judgment had been revived on two of the Bonds recited in the mortgage,) and the sale under the execution, notwithstanding the proceedings and sale might have been defective; and that from 1771 to 1790, when C. took possession, after deducting the period of the Revolutionary War. there had not been sufficient time on which to found a presumption; and that consequently the Mortgage was a good outstanding title, and sufficient to protect the defendant's possession, independent of the Sheriff's deed. *Jackson ex. dem. Livingston & Al. vs. Delancey & Al.* 11 Johns. Rep. 365.

A satisfied Mortgage, though paid off by the Defendant, is not a bar in Ejectment. *Jackson ex. dem. Watson vs. Cris.* 11 Johns. Rep. 437.

An outstanding title in a person other than the lessor of the plaintiff in Ejectment, is sufficient to defeat his recovery, though the defendant do not claim under that title. *Jackson ex. dem. Loop et. Al. vs. Harrington,* 9 Cowen's Rep. 86.

And this, it seems, though the title be outstanding in the trustee of the lessor. *Jackson ex. dem. Loop et. Al. vs. Harrington,* 9 Cowen's Rep. 86.

A mortgage before foreclosure or entry, is not a legal title which a stranger can set up. *Collins vs. Torrey,* 7 Johns. Rep. 278. *Jackson ex. dem. Martin vs. Pratt,* 10 Johns. Rep. 387.

"It can only be used by the Mortgagee and his representatives." *Collins vs. Torrey,* 7 Johns. Rep. 282.

When the Mortgagee has never entered, and there has been no foreclosure, and interest has not been paid within twenty years, a Mortgage is not a subsisting title. *Collins vs. Torrey,* 7 Johns. Rep. 278. *Same Point,* *Jackson ex. dem. Klock vs. Hudson,* 3 Johns. Rep. 381. (Per KENT, CH. J., delivering the Opinion of the Court.)

But the assignee of a Mortgage in possession, is protected by the Mortgage, though no foreclosure of it is shown.—*Jackson ex. dem. Minkler vs. Minkler & Al.,* 10 Johns. Rep. 480.

Where no possession had been taken under a Mortgage, nor any interest paid, nor steps taken to enforce it for 19 years; held not to be a subsisting outstanding title, and that a jury might presume it satisfied. *Jackson ex. dem. Martin vs. Pratt,* 10 Johns. Rep. 381.

In the case of *Jackson ex. dem. Dox vs. Jackson,* (5 Cow. Rep. 174.)—SUTHERLAND, J., in delivering the Opinion of the Court, said:

"But it is perfectly immaterial whether *Jackson*, the mortgagor was "dead or alive. The defendant professed to derive all his title from him. "He supposed him dead, and therefore claimed as his heir. But if he was "alive, then the defendant was merely his tenant. In neither case could his possession be adverse to that of *Jackson*, on his mortgagee." & *Vide Higginson vs. Mein.* 4 Cranch's Rep. 419.

Where premises were mortgaged in fee, with a proviso for conveyance, if the principal were paid on a given day, and in the mean time that the mortgagor should continue in possession; upon special verdict, it was found that the principal was not paid on the given day, but that the mortgagor

recover against a stranger, who, without any title whatsoever, ousted him, and got possession.(w) So, also, where a man leased land for years, and

(w) *Doe d. Crisp, v. Barber*, 2 T. R. 749. It is said in the case of *Allen v. Rivington*, 2 Saund. 111. that "in ejectment, if it appear by the record of a special verdict, that the

plaintiff has a priority of possession, and no title is found for the defendant, the plaintiff shall have judgment;" but this doctrine seems directly overruled, by the case here cited.

continued in possession. There was no finding by the jury either that interest had, or had not been paid by the mortgagor: *Held*, that upon this finding, it must be taken, that the occupation was by the permission of the mortgagee; and consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the Statute of Limitations: *Held also*, that an entry is not necessary to avoid a fine levied by the mortgagor. *Hall vs. Doe ex dem. Surtees & Al.*, 5 Barnew. & Ald. Rep. 687.

But where a bona fide purchaser from a mortgagor, entered, without notice of the mortgage, (which was not registered till after the commencement of the Ejectment suit,) and he and those claiming under him, had "been in the continued possession of the premises under a colour of title" for more than seven years," it was held a sufficient adverse possession to bar the mortgagee, or any claiming under him, from recovering in ejectment. *Baker vs. Evans*, 2 N Car. Law Repos. 614, 616.

"Neither a mortgagor nor his assignee can hold adverse possession to the mortgagee, unless the assignee has taken a conveyance without notice; otherwise they are mere tenants at will," *Newman vs. Chapman*. 2 Rand. Rep. 93.

When a person who had a mortgage of lands, was afterwards attainted; *Held*, that the mortgage might be set up against the people, as having succeeded to the rights of the mortgagor. *Jackson ex dem. People vs. Pierce*, 10 Johns. Rep. 414.

But if a defendant have acknowledged the title of the plaintiff, he cannot afterwards dispute it. *Jackson ex dem. Low vs. Reynolds*. 1 Caines' Rep. 444, *Jackson ex dem. Smith & Al. vs. Stewart*, 6 Johns. Rep. 34. *Jackson ex dem. Davy vs. De Walts*, 7 Johns. Rep. 157. *Jackson ex dem. Bowne vs. Hinman*, 19 Johns. Rep. 202.

And even where the predecessors of the Defendant, had acknowledged the title of the claimant, it was *Held* that the Defendant was equally precluded from setting up the defence of adverse possession. *Jackson ex dem. Van Schaick & Others vs. Davis*, 5 Cow. Rep. 129, 130.

And to the same purport, *Vide Jackson ex dem. Griswold & Al. vs. Bard*, 4 Johns. Rep. 230. *Brandter ex dem. Fitch vs. Marshall*, 1 Caines' Rep. 394. *Rowletts vs. Daniel*. 4 Munf. Rep. 473.

A possession of land, taken under an executory contract for the purchase thereof, is in no sense adverse to the person with whom the contract is made. *Jackson ex dem. Stewart & Uz. vs. Johnson*, 5 Cow. Rep. 74. *Jackson ex dem. Young & Al. vs. Camp*, 1 Cow. Rep. 610. *Botts & Al. vs. Shields' heirs*, 3 Litt. Rep. 34. *Morris vs. Thomas*, 5 Binn. Rep. 77. *The Proprietors of Township Number Six, vs. MFarland*, 12 Mass. Rep. 325. *Higginbotham & Al. vs. Fishback*, 1 Marsh. Rep. (Ky.) 506. *Wilkinson &c. vs. Nichols*, Monr. Rep. 36. *Richardson & Al. vs. Broughton*, 2; Nott &

his lessee, after having been in possession a considerable time, made an un-

*M'Cord's Rep.* 417. *Jackson ex dem. Griswold & Al. vs. Bard*, 4 *Johns. Rep.* 230.

Where one takes by descent as a co-heir and tenant in common, he cannot shew, (in ejectment by his co-heir, or one claiming under him) that the ancestor had no title. *Jackson ex dem. Hill vs. Streeter*, 5 *Cox. Rep.* 529.

In the case of *Pender vs. Jones*, (2 *Hayw. Rep.* 294.) TAYLOR, J. said: "I am of opinion, that a deliberate avowal on the part of the possessor, of "title in the claimant, or a serious assent to the validity of his title, will "render an entry or claim unnecessary, and is equivalent in its effects to an "entry or claim."

But where the lessors proved no seisin or title in themselves, and relied upon proof of an agreement by the persons in possession to take a lease from them, but there was no proof that any lease was ever executed or any rent paid, and the defendant claimed to hold adversely, and shewed a title in third persons, the Court after stating these facts, added, "It does not appear that the defendant was put into possession by the lessors, or that he "ever paid them any rent. The defendant must have judgment." *Jackson ex dem. Southampton & Al. vs. Cooley*, 2 *Johns. Cas.* 223.

And where A. in the year 1779, as the tenant of B. and by his directions entered into the premises in question and took possession, which was regularly continued down to the defendant; and B. at the time wrote to C., (who also claimed the premises, as lying on his, C.'s side of the division line,) that he, (C.) was mistaken in supposing the land to be his own; but that when the times became more peaceable he, B. and C. would have the land surveyed, and if the land did belong to C. then A. should pay rent, &c. It was held that this letter merely suspended the operation of the Statute of Limitations during the War; and that there having been more than twenty years adverse possession under B.'s title since 1783, C. could not recover. *Jackson ex dem. Brott & Al. vs. Hunt* 6 *Johns. Rep.* 16.

The defendant went into possession of land under *Gansevoort*, whom he supposed to be the owner of the soil; but afterwards believing that Mrs. Clark was the owner, he applied to her to purchase the land: after that application, Mrs. Clark conveyed the premises to Viely, who before bringing suit ordered the Defendant to leave the premises. Held, that the Defendant could not set up an adverse possession of twenty years; though he might shew that he made the application under a mistake, and prove a title out of the lessors of the Plaintiff. *Jackson ex dem. Viely & Clark vs. Cuerden*, 2 *Johns. Cas.* 353.

"The repeated acts of the Defendant, recognizing the plaintiff's title "by applications to purchase from him both before and after he entered "into possession of the premises, afforded the strongest reason to presume "that the defendant was in possession under David Russell [one of the Lessors of the Plaintiff.] We are accordingly of opinion that the Plaintiff ought to have judgment." *Jackson ex dem. D. Russell & Al. vs. Croy*, 12 *Johns. Rep.* 430. (Per YATES, J. delivering the Opinion of the Court.) & Vide *Jackson ex dem. Brown & Al. vs. Ayers*. 14 *Johns. Rep.* 224.

Where an acknowledgment of tenancy on the part of the defendant in Ejectment has been proved, he will not be allowed to give evidence to con-

der lease, the under lessee, upon an ejectment brought by his immediate

tradict or disprove the title of his landlord *Jackson ex dem. Van Alen vs. Vosburgh*, 7 Johns. Rep. 186. *Jackson ex dem. Van Schatck & Al. vs. Davis*, 5 Cow. Rep. 129, 130. *Lessee of Galloway vs. Ogle*, 2 Binney's Rep. 472. *Graham & Al. vs. Moore & Al.* 4 Serg. & R. Rep. 467. *Brandter ex dem. Fitch vs. Marshall*, 1 Caines' Rep. 401. *Jackson ex dem. Webber & Al. vs. Harsen & Al.* 7 Cow. Rep. 323. *Jackson ex dem. Low & Al. vs. Reynolds*, 1 Caines' Rep. 444. & *Vide Jackson ex dem. Bleecker vs. Whitford*, 2 Caines' Rep. 215 *Jackson ex dem. Klein vs. Graham*, 3 Caines' Rep. 188. *Barr vs. Gratz's Heirs*, 4 Wheat. Rep. 222, 223.

A tenant, who endeavours to deprive his landlord of the benefit of possession, under a fraudulent pretence of giving it up, is still to be considered a tenant, and cannot defend himself as a stranger, nor prevent by any pretence under such circumstances, his landlord from regaining possession. A person who comes into possession under a tenant, is in no better condition than the tenant himself; and cannot defend his possession against the landlord. *Graham & Al. vs. Moore & Al.* 4 Serg. & R. Rep. 467. 470.

"It has been decided, and is the settled law of the Country, that a tenant shall not resist the recovery of his Landlord, by virtue of an adverse title acquired during his lease." *Lessee of Galloway vs. Ogle*, 2 Binneys' Rep. 472. & *Vide Graham & Al. vs. Moore & Al.* 4 Serg. & R. Rep. 467.

The rule of law, that the tenant cannot contest his landlord's title, is not applicable, where the title of such landlord is a *Connecticut* title, existing in violation of the laws of *Pennsylvania*. Therefore, such tenant, afterwards purchasing a *Pennsylvania* title, and continuing to hold under it, may set it up against his original landlord, who claimed under a *Connecticut* title, though subsequently to such purchase, the landlord also took out another *Pennsylvania* title. *Satterlee & Al. vs. Matthewson*, 13 Serg. & R. Rep. 133.

In the case of *Miller vs. M'Brier, in Error*, (14 Serg. & R. Rep. 384, 385.) *Gibson, J. delivering the Opinion of the Court*, said, "That a tenant cannot deny his landlord's title is certain; and by an application of this rule to the circumstances of the case, the Court excluded the evidence with which the defendant offered to impeach an original title, with which also the landlord set out. Where a landlord shows no title, but asks to be restored to the possession with which he parted, good faith requires it should be redelivered to him, it being no answer to say he is not the owner of the land. But where, as in this case, he claims on the separate grounds of original title, and as having parted with the possession pursuant to a lease, the defendant will be permitted to meet him separately on each." & *Vide Camp. vs. Camp*, 5 Conn. Rep. 300, 301.

Payment of rent by a lessee to a lessor after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless, at the time of payment the lessee knows the precise nature of the adverse claim, or the manner in which the lessor's title has expired. *Fenner vs. Duplück & Another*, 2 Bing. Rep. 10.

A tenant deriving title under a lease, cannot dispute his landlord's right

lessor, \*was allowed to shew that the lease from the original [ \*32 ]  
lessor had expired, and thereby nonsuited the plaintiff. (x)

(x) *England d. Syburn, v. Slade*, 4 T. R. 682.

by shewing that the premises are in another patent. *Jackson ex dem. Bleecker vs. Whitford*, 2 Caines' Rep. 215.

A purchaser at a Sheriff's sale becomes *quasi* tenant, and it is not to be presumed that he holds adversely. *Jackson ex dem. Klein vs. Graham*, 3 Caines' Rep. 189. & *Vide Waring vs Jackson ex dem. Eden & Al.* 1 Peters' Rep. (Sup. Ct. U. S.) 570.

The possession of a defendant after a sale under an execution is not deemed adverse, for he becomes *quasi* a tenant at will to the purchaser. *Jackson ex dem. Kanes vs. Sternbergh*, 1 Johns. Cas. 153. *Russell vs. Doty, Sheriff. &c.* 4 Cow. Rep. 576. & *Vide Langdon vs. Potter & Al.*, 3 Mass. Rep. 128.

One claiming under a deed from a judgment debtor has not such an adverse possession as will avoid a conveyance executed by a purchaser under an execution upon the judgment. *Jackson ex dem. Scofield vs Collins*, 3 Cow. Rep. 89.

(But in *M'Raa vs. Smith*, [2 Bay's Rep. 339.] It was Held; That possession of land five years, under a sale from defendant, who has a judgment against him, will be a good bar against a judgment creditor or those claiming under him, who has lain by that time without reviving his judgment, or bringing suit against such possessor.)

If the equitable estate be confiscated, the Court, in Ejectment, will not allow the outstanding legal title to be set up in bar of the title of the purchaser. *Lessee of Delancy vs. M'Kean*, 1 Wash. Circ. Ct. Rep. 354.

In Ejectment when the defendant has shown title in a third person, the plaintiff cannot demur to the evidence till the defendant has gone through the whole. *Proprietary's Lessee vs. Ralston*, 1 Dall. Rep. 18.

An application on which a survey had been made and returned, though the proprietor does not appear to have pursued his claim by entering upon the land or occupying it, or paying the purchase money to the State, or otherwise, except by bringing an Ejectment, in which there was a verdict for the defendant, is a subsisting title in a third person, under which the defendant in an Ejectment may protect himself. *Watson vs. Gilday*, 11 Serg. & R. Rep. 337.

But if both parties claim by improvement, and the plaintiff prove a settlement of boundaries between the defendant and himself by agreement, the defendant cannot set up a title in a third person, to bar the plaintiff's recovery. *Ibid.*

If the plaintiff in Ejectment claim both on an original title and by virtue of a lease from him to the defendant, it is competent to the defendant to depend on both grounds and it is error in the Court to assume the existence of the lease, and prohibit the defendant from showing that the title is not in the plaintiff, but in a third person. *Miller vs. McBrier*, 14 Serg. & R. Rep. 382.

Where a copy holder has been admitted to a tenement, and done fealty to the Lord of the manor, he is estopped, in an action by the lord for a

In order to enable a claimant to support an action of ejectment, he must be clothed with the legal title to the lands. (y)[1] No equitable ti-

(y) *Goodtitle, d Jones v. Jones*, 7 T. R. R. 2. *Doe, d. Blake, v. Luxton*, 6 T. R. 289. 43, 47. *Doe, d. Da Costa, v. Wharton*, 8 T.

forfeiture, from showing that the legal estate was not in the lord at the time of admittance. *Doe dem. Nepean vs. Budden*, 5 *Barnew. & Ald. Rep.* 626.

Since the rule is universal, that a plaintiff in Ejectment must show the right to possession to be in himself positively, and it is immaterial as to his right to recover, whether it be out of the tenant or not, if it be not in himself, it follows, that a tenant is always at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself. *Love vs. Simm's Lessee*, 9 *Wheat. Rep.* 515.

If defendant rely upon the original title of the proprietor, he must shew the title to be subsisting either in the proprietor, or in himself derived from the proprietor. *Lessee of Allen vs. Lyons*, 2 *Wash. Circ. Ct. Rep.* 475

An outstanding legal estate cannot in Pennsylvania, be set up to bar a plaintiff entitled to the equitable estate. *Lessee of Delancy vs. M'Kean*, 1 *Wash. Circ. Ct. Rep.* 354.

If defendant sets up an outstanding title in a stranger to preclude the plaintiff from recovering, he must show a subsisting and available title on which the asserted owner might recover in Ejectment if he were plaintiff. The defendant cannot avail himself of a title barred by the Statute of Limitations. *Lessee of Foster vs. Joice*, 3 *Wash. Circ. Ct. Rep.* 498.

[1] To recover in Ejectment, the lessors of the plaintiff must have a legal title in the land at the commencement and trial of the cause. *Carroll & Al. Lessee vs. Norwood's Heirs*, 5 *Harr. & Johns. Rep.* 164.

An equitable claim, cannot prevail against the legal estate. *Jackson ex dem. Potter vs. Sisson*, 2 *Johns. Cas.* 321. *Jackson ex dem. Loop & Al. vs. Harrington*, 9 *Cowen's Rep.* 88.

Especially if such equitable claim be doubtful. *Ibid.*

"In the Action of Ejectment, we must look steadily to the legal title." (*Per KENT, Ch. J. delivering the Opinion of the Court.*) *Jackson ex dem. Lathrop vs. Demont*, 9 *Johns. Rep.* 60.

If the plaintiff have the legal title, the defendant cannot set up an equitable title in bar. *Jackson ex dem. Smith vs. Pierce*, 2 *Johns. Rep.* 221. Same point, *Jackson ex dem. Potter vs. Sisson*, 2 *Johns. Cas.* 321. *Jackson ex dem. Kemball vs. Van Slyck*, 8 *Johns. Rep.* 487. *Jackson ex dem. Whitlock & Al. vs. Devo*, 3 *Johns. Rep.* 422, 423. *Jackson ex dem. Simmons & Al. vs. Chase*, 2 *Johns. Rep.* 86.

"The only way in which an equitable title can be assisted, at law, is, by allowing the presumption, in certain cases, to prevail, that there has been a conveyance of the legal estate" (*Per THOMPSON, J. delivering the Opinion of the Court.*) *Jackson ex dem. Smith & Al. vs. Pierce*, 2 *Johns. Rep.* 226.

In Pennsylvania, it seems, a valid equitable title is sufficient to sustain

tle will avail. And this principle is so fixed and immutable, that a trustee may maintain ejectment against his own *cestui que trust*; (z)[2] and

(z) *Roe, d. Reade, v. Read*, 8 T. R. 118, 123.

Ejectment. *Hawn vs. Norris & Al.* 4 Binn. Rep. 77. *Sim's Lessee vs. Irvine*, 3 Dall. Rep. 425. 456, 457.

It seems if there is a clear intent to make land chargeable with money, Ejectment may be supported, when it is the most convenient, or only way of compelling payment from the proceeds of the land. *Galbraith & Al. vs. Fenton & Ux.* 3 Serg. & R. Rep. 359. (IN ERROR.)

If the plaintiff in ejectment is bound in equity to make title to the defendant, for a part of the premises, the Court will do the defendant justice, by staying execution upon the judgment until the title is secured. *Lessee of Mathers vs. Akewright*, 2 Binn. Rep. 93.

An Ejectment may be commenced on a strict, legal title, and the plaintiff may rebut a countervailing equity, set up by the defendant, on the trial. *Innis & Al. vs. Campbell & Al.* 1 Rawle's Rep. 373.

If incumbrances exist they may be valued and allowed for by the jury. *Ibid.*

The remedies in the courts of the *United States* are to be at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity, as distinguished and defined in England: therefore, a title, which upon general principles, is merely equitable, will not support an Ejectment, unless the statutes of the state have changed it into a legal title. *Robinson vs. Campbell*, 3 Wheat. Rep. 212.

But when, by the statutes of a state, a title which would otherwise be deemed merely equitable, is recognised as a legal title; or a title which would be good at law is under circumstances of an equitable nature declared void, the rights of the parties in such case may be as fully considered in a suit of law, in the courts of the *United States*, as they would in any state court. *Ibid.*

An action of Ejectment cannot be maintained in the circuit Court in *Pennsylvania*, upon an equitable title alone. *Carson's Lessee vs. Boudinot*, 2 Wash. Circ. Ct. Rep. 33.

In an action of Ejectment brought against a third person, he cannot object that the title of the lessor of the plaintiff, founded on a conveyance by a trustee of the legal estate, is invalid, because in making it the trustee had abused his trust. Even those who may be injured can have redress only in equity. *Lessee of Bayard vs. Colfax & Al.* C. C. U. S. N. J. April, 1821. MS. (Cited in Coxe's Digest, 272, § 41.)

An agreement signed by the agent of the lessor of the plaintiff in Ejectment, for the sale and conveyance of the land to the defendant, cannot be given in evidence in a trial at law; it is at most evidence only of an equitable title. *Lessee of Willink vs. Mills*, 1 Peters' Circ. Ct. Rep. 429.

The plaintiff in ejectment must shew that he has the oldest legal title in himself. *Talbot vs. Callaway*, Hard. Rep. 35. *Quarles vs. Brown*, *Ibid.* 36. (Cited by the COURT.)

[2] A trustee, holding the legal title, may maintain ejectment, even af-



an unsatisfied term outstanding in trustees will bar the recovery of the heir at law, even though he claim only subject to the charge. (a)

[\*33] In the time of Lord Mansfield, \*indeed, the Court of King's Bench seemed inclined to adopt a different principle, and to exercise a species of equitable jurisdiction in this action. Thus, a mortgagee was permitted to maintain ejectment against a tenant, claiming under a lease granted prior to the mortgage, provided he gave notice to the tenant, that he did not intend to disturb the possession, but only to get into the receipt of the rents and profits of the estate ; (b) the legal estate of a trustee was not allowed to be set up against the *cestui que trust* ; (c) and a reversioner was allowed to recover his reversionary interest, subject to a lease and immediate right of possession in another. (d) These cases, however, have long been overruled, [1] and the clearness and certainty of the principle since adopted amply compensate for the partial inconvenience it may at times occasion.

(a) *Doe, d. Hodson, v. Staple*, 2 T. R. 684

*v. Staple*, 2 T. R. 684. *Doe, d. Gibbon, v.*

(b) *Keech, d. Werna, v. Hall*, Doug. 21.

*Pott*, Doug. 710, 721, *et vide Oates, d. Wigfall, v. Brydon*, Barr. 1895. 1901.

*Moss v. Gallimore*, Doug. 279. B. N. P. 96.

(c) *Lade v. Holford*, B. N. P. 110. S. C.

(d) *Per Buller, J. in Doe, d. Bristow, v.*

*Barr. 1416. S. C. Blk. 428 Doe, d. Hodson,*

*Pegge*, 1 T. R. 759 (in *notis.*)

ter the trust is satisfied. Although a *cestui que trust*, after the trust is satisfied, may maintain ejectment, that does not deprive the trustee, holding the legal title of his right to maintain such an action. *Hopkins, &c. vs. Stephens & Al 2 Randolph's Rep. 422.*

Where the defendant in Ejectment, has only an equitable title to hold real estate till certain monies are reimbursed, the plaintiff is entitled to recover if such monies are reimbursed at the time of trial ; but if the defendant has a legal title of that description, the plaintiff cannot recover unless the monies were reimbursed at the institution of the ejectment. *Thomas vs. Wright (IN ERROR) 9 Serg. & R. Rep. 87.*

In *Pennsylvania* Ejectment is an equitable action and wherever Chancery would execute a trust, or decree a conveyance, the Courts of this State with the instrumentality of a Jury will direct a recovery in Ejectment. *Peebles vs. Reading, 8 Serg. & R. Rep. 404.*

[1] But in the case of the *Town of North-Hempstead, &c vs. The Town of Hempstead, &c.* (2 *Wend. Rep. 109. 134.*) it was recently adjudged by the unanimous decision of the Court for the Correction of Errors, That *Cestuis que Trust*, in the case of a resulting Trust, may maintain or defend Ejectment for the lands which constitute the trust property. In that case, SAVAGE, Ch. J. delivering the Opinion of the Court, said, " There is still " another ground on which the title in the town may be sustained It is " fairly inferrible, that if any consideration was paid in the first instance, " all the inhabitants contributed to it. The grant is to the patentees and " their associates, heirs, successors and assigns. If the patentees were

The claimant must also have a right to the possession; that is to say, he must have a right of entry upon the lands at the time of the demise in the declaration. And whatever takes away this right of entry or possession, and turns the same into a right of action, will also deprive the claimant of his remedy by ejectment, although the legal title still remains in him. But if he be entitled to the possession at the time the demise is laid, it will be sufficient, although such right of possession be divested before trial; for the action of ejectment is intended to give the party compensation for the trespass, as well as to enable him to recover possession of the land; and he has a right to proceed for \*such trespass, although his right to the possession should [\*34] cease.(e)[1]

The origin of the principle, that the lessor must have a right of entry, has already been considered,(f) and we must now notice the several ways by which this right of entry or possession may be destroyed. The consideration of the effects of fines levied with proclamations, and of the

(e) *Doe, d. Grundy, v. Clarke*, 14 East, 488.

(f) *Vide ante*, 10.

"trustees, and the *cestuis que trust* paid the consideration, there was then "a resulting trust in their favor; and such *cestuis que trust* have been "considered as possessing the equitable estate, and the legal also, so far "as to enable them to defend or maintain an action of Ejectment for lands "thus held by them."

A *cestuy que trust*, after the purposes of the deed have been satisfied, may maintain Ejectment, upon a demise in his own name, although the legal estate is still in the trustee. *Hopkins & Watson vs. Ward and Others*, 6 *Munford Rep.* 38.

[1] "This suit was brought before the termination of the life estate; and "it appears by the plaintiff's own shewing, not only that his estate is ended, but that the defendant has the reversionary interest. The plaintiff, "then, has no title to turn the defendant out of possession; but he has a "title to the mesne profits and costs of this suit, and must, therefore, have "judgment to enable him to recover them." (*Per SPENCER, Ch. J. delivering the Opinion of the Court.*) *Jackson ex dem. Henderson vs. Davenport*, 18 *Johns Rep.* 302.

"§ 1. If the right or title of the plaintiff in ejectment expire after "the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the "defendant, to be assessed; and that as to the premises claimed, the defendant go thereof without day." "*Revised Statutes*" of New-York, Part 3, Chap. 6, Tit. 1. § 31. (*Vol. 2. p. 308.*)

right of entry, as between landlord and tenant, for condition broken, will be reserved for the two following chapters : those acts only are here to be considered, which take away the right of entry from the claimant, but leave in him, notwithstanding, the right of property or of action.)

In this point of view, a right of entry may be destroyed in three several ways. First, by Discontinuance ; secondly, by Descent ; and, thirdly, by the Statute of Limitations.

#### I. BY DISCONTINUANCE.

A discontinuance of an estate signifies such an alienation made or suffered, by any person seised of an estate-tail,[2] or *in autre droit*, in things which lie in livery, as takes away the entry of the person entitled after the death of the alienor.

“ This injury happens when he who hath an estate-tail, [ \*35 ] maketh a larger estate of the land than by law he is entitled to do ; in which case the estate is good, so far as his power extends who made it, but no farther. As if a tenant in tail makes a feoffment in fee simple, or for the life of the feoffee, or in tail ; all which are beyond his power to make, for that, by the common law, extends no farther than to make a lease for his own life : here the entry of the feoffee is lawful during the life of his feoffor ; but if he retains the possession after the death of his feoffor, it is an injury, which is termed a discontinuance ; the ancient legal estate, which ought to have survived to the heir in tail, being gone, or at least suspended, and for a while discon-

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[2] An act of the Legislature of the state of New-York, passed 23d February, 1786, (9th Sess. Chap. 12. 1 R. L. 52.) abolished all estates tail, and converted them into estates “ in fee simple absolute.”

The “ *Revised Statutes*,” Part 2, Chap. 1. Tit. 2, §§ 3 & 4, (Vol. 1. p. 722.) contain the like provisions.

“ § 3. All estates tail are abolished ; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed previous to the twelfth day of July, one thousand seven hundred and eighty-two, shall hereafter be adjudged a fee simple ; and if no valid remainder be limited thereon, shall be a fee simple absolute.”

“ § 4. Where a remainder in fee shall be limited upon any estate, which would be adjudged a fee tail, according to the law of this state, as it existed previous to the time mentioned in the last section, such remainder shall be valid as a contingent limitation upon a fee, and shall vest in possession, on the death of the first taker, without issue living at the time of such death.”

tinued. For, in this case, on the death of the alienors, neither the heir in tail, nor they in remainder or reversion, expectant on the determination of the estate-tail, can enter on and possess the lands so alienated; because, the original entry of the feoffee being lawful, and an apparent right of possession being thereby gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant.(g)

By the common law, an estate-tail may be discontinued five ways: first, by confirmation with warranty; secondly, by feoffment; thirdly, by fine; fourthly, by common recovery; fifthly, by release.

An estate-tail cannot, however, be discontinued, except where he, who makes the discontinuance, was once seised by force of the in-tail, that is, seised of the freehold and\* inheritance of the estate in tail, and not of a remainder or reversion expectant upon a freehold.(h) Hence, if there be tenant for life, the remainder in tail, &c. and tenant for life, and he in the remainder in-tail levy a fine, this is not any discontinuance or divesting of any estate in remainder, but each of them passes that which they have power and authority to pass.(i)

So, also, to make a discontinuance, by levying a fine, it is necessary that the estate should pass to the alienee by virtue of the fine; if, therefore, the tenant in tail first alienate his estate, by modes of conveyance, which transfer only the possession, and not the right, as by bargain and sale, lease and release, &c. and the grantee is seised by virtue of such conveyance, a fine, levied afterwards by the tenant in tail, will not operate as a discontinuance of the estate-tail; but the right of entry will remain to the remainder-man, or reversioner for the first five years after his title accrues.(j)

But, where tenant in tail-male, with remainder over in fee, in consideration of a marriage, conveyed his estate-tail by lease and release, to trustees, and their heirs, to several uses, and, in the release, covenanted to levy a fine to the same uses, and did, after his marriage, levy a fine, in pursuance of his covenant, it was held that this fine operated as a discontinuance of the estate; because, the lease, release, and fine, were all but one assurance, and operated as such; for, that the deeds could only be considered as a covenant to levy a fine, and were incomplete till the fine was levied, so that the estate-tail passed by the fine.(k)

(g) 3 Blk. Com. 171, 5.

(h) 1 Inst. 347, (b), *et vide* Litt. §. 640, 669.

(i) 1, Inst. 302, (b)

(j) *Seymour's case*, 10 Co. 96, (a).

(k) *Doe & Odierne, v. Whitehead*, Burr.

704.

[\* 37] \*This case was distinguished from *Seymour's*, because, in that case, the fine was not levied until a year after the bargain and sale was enrolled, and it was expressly found by the verdict, that the bargainee entered, and was seised by force of the bargain and sale *only*; so that the bargain and sale was totally unconnected with the fine; nor did it appear that any fine was intended to be levied at the time when the bargain and sale was executed.

In the case of *Moor v. Blake*, (1) which was an ejectment tried before the late Mr. Justice *Gould*, the title of the lessor of the plaintiff was under a marriage settlement, by which certain premises were settled on the husband and wife for their lives, and the life of the survivor, remainder to trustees, to preserve contingent remainders, remainder (after a power of appointment which had never been executed) to all and every the children of the marriage, as tenants in common *in-tail*, with cross remainders, in default of issue of any child, to the survivors *in-tail*, with the remainder to the survivor of husband and wife, in fee. Three daughters were the issue of the marriage; the first of whom died without issue, the second married the lessor of the plaintiff, and the third married the defendant *Blake*, and died *without issue*; previous to her death, however, she and her husband had levied a fine with proclamations of her moiety, to recover which the ejectment was brought. The counsel for the defendant proved the fine levied with proclamations, upon which the plaintiff was nonsuited: the learned judge declaring, that, in his opinion, the levying of the fine had discontinued the estate-tail, taken away the claimant's right of entry, and driven him to his writ of *formedon*.

[\* 38] \*By the common law, the alienation of a husband, who was seised in right of his wife, worked a discontinuance of her estate; but now, by the 32 Hen. VIII. c. 28. s. 6. it is provided, that no act of the husband only shall work a discontinuance of, or prejudice, the inheritance or freehold of the wife. but that, after his death, she, or her heirs, may enter on the lands in question; and, therefore, the wife, or her heirs, may now, in such cases, support ejectment.[1]

(1) *Run. Eject.* 45.

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[1] The Revised Laws of 1813, (*Laws of New-York*, Vol. 1, p. 182.) contain the following sections:

" II. *And be it further enacted*, That no fine, feoffment or other act

A feoffment by husband and wife is within this statute; because, in

“suffered or done by the husband only of any lands, tenements or hereditaments being the inheritance or freehold of his wife, during the coverture between them, shall prejudice the said wife or her heirs, or such as shall have right or interest to the same upon the death of such wife; but they may respectively enter into and enjoy the same, according to their rights and titles therein, as if no such act had been done or suffered.”

“III. And be it further enacted, That if the husband lose by default the land which was the right of the wife, the wife after the death of her husband may have a writ of right or an action of ejectment to recover the same, and the judgment by default shall be no bar to such action; and if any tenant in dower, tenant by the curtesy or other tenant for term of life or lives, who shall be impleaded, make default or give up the lands demanded, and judgment be given upon such default or surrender, the heirs or person to whom the reversion or remainder doth appertain after the death of such tenants, may have their action of ejectment to recover the same lands.” (24th Sess. Chap. 169, Vol. 1, p. 182.)

The provisions on this subject made by the “*Revised Statutes*,” now the Law of the State, will be found in Part 2, Chap. 1, Tit. 2 §§ 136, 142, 143, 144 & 145, (*Vol. 1, pp. 738, 739*); and in Part 3, Chap. 5, Tit. 7, §§ 5, 6 & 24 *Vol. 2, pp. 340, 343*), in these Words:

“§ 136. The mode of conveying lands by feoffment with livery of seisin, is abolished.”

“§ 142. Deeds of bargain and sale, and of lease and release, may continue to be used, and shall be deemed grants; and as such, shall be subject to all the provisions of this Chapter, concerning grants.”

“§ 143. No greater estate or interest shall be construed to pass by any grant or conveyance, hereafter executed, than the grantor himself possessed at the delivery of the deed, or could then lawfully convey, except that every grant shall be conclusive as against the grantor and his heirs claiming from him by descent.”

“§ 144. Every grant shall also be conclusive as against subsequent purchasers from such grantor, or from his heirs claiming as such, except a subsequent purchaser, in good faith and for a valuable consideration, who shall acquire a superior title by a conveyance that shall have been first duly recorded.”

“§ 145. A conveyance made by a tenant for life or years of a greater estate than he possessed or could lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantee all the title, estate or interest, which such tenant could lawfully convey.” (*Vol. 1, pp. 738, & 739.*)

“§ 5. If the husband lose by default, any land which was the right of his wife, the wife, after the death of her husband, may have an action of ejectment to recover the same, and the judgment by default shall be no bar to such action.”

“§ 6. All recoveries had by agreement of the parties, or by fraud, against any tenant for life, in dower, or by the curtesy, of any lands, tenements or hereditaments, shall be void against all persons to whom any reversion or remainder of such lands may appertain, and against their heirs, unless the appearance of the person having such reversion or re-

substance, it is the act of the husband only; [3] but a fine levied by the husband and wife is not. (m)

(m) 1 Inst. 326, (a) *Cromwell's case*, 2 Co. 77, (b)

"mainder, shall have been duly entered in the court where such recovery shall be had. But this provision shall not extend to any person who shall recover any lands, tenements or hereditaments without fraud, by reason of any former right or title."

"§ 24. All writs of right, writs of dower, writs of entry and writs of assize, all fines and common recoveries, and all other real actions known to the common law, not enumerated and retained in this Chapter; and all writs and other process heretofore used in real actions, which are not specially retained in this Chapter; shall be, and they are hereby abolished." (Vol. 2, pp. 340, 343.)

According to the decision of the Supreme Court in the case of *Jackson ex dem. McCrea vs. Mancius & Al.* (2 Wend. Rep. 357.) the effect of the above provisions in the *Revised Laws*, of 1813, and the "*Revised Statutes*," respectively, must be the same, although somewhat different in terms: The Court Held, That, a deed by a tenant by the curtesy, although purporting to convey a fee, passes only a life estate, when it is affirmatively shewn that the grantor had only an estate for life, and when the form of conveyance used by him carries only such estate as he had. SAVAGE, Ch. J. in delivering the Opinion of the Court, made the following remarks:

"Could not, then, a tenant by the curtesy convey in fee without having an estate in fee? The parliament of Great Britain supposed that such an act might be done, and guarded against it by statute 32 Henry 8, ch. 28, which provision was re-enacted in this state at an early day, (1 R. L. 181, 2, 3;) by which it is enacted, that no fine, seoffment or other act of the husband in relation to the freehold or inheritance of his wife, shall prejudice such wife or her heirs."

"I conclude, therefore, that there is nothing in the fact of McCrea's conveying a fee, to shew that he had the capacity to convey such an estate when it is shewn that he had only an estate for life, and when, also, the form of conveyance used by him carried only such estate as the grantor had."

"Estates for life are considered at common law as strict feuds, and are forfeitable for certain causes. If tenant for life, including tenant by the curtesy, takes upon him to convey a greater estate than he has, in such a manner as to divest the estate in reversion or remainder, such conveyance will operate as a forfeiture of his estate for life, and the reason given (a very singular one in this country,) is because it is a renunciation of the feudal connection between him and his lord. (1 Cruise, 122, § 36, and 173, § 31. Co. Litt. 252, a Com. Dig. Forf. a. 1.) The form of conveyance for this purpose must be such as to divest the estate of the reversioner or remainderman, and these were three: seoffment with livery of seisin, fine, and common recovery; but a conveyance by lease and release, or bargain and sale, is no forfeiture."

[2] "II. And be it further enacted, That no estate of a feme covert, residing in this state, shall pass by her deed, nor shall the same be recorded without a previous acknowledgment taken in manner aforesaid

When, also, the husband and wife are jointly seised to them and their heirs, or the heirs of their two bodies, of an estate made during the

"If the conveyance in this case was by feoffment, the injury is one which is termed a *discontinuance*, the entry of the feoffee being lawful during the continuance of the particular estate, but by his continuance in possession after the death of the feoffor, the legal estate of the heir was gone or at least suspended, and for a while discontinued. When the right of entry is thus lost, and the party can only recover by action, the possession is said to be discontinued. By the common law, the alienation of a husband who was seised in right of his wife, worked a discontinuance of the wife's estate, till the statute 32 Hen. 8, ch. 28, provided that no act by the husband alone should work a discontinuance of, or prejudice the inheritance or freehold of the wife. (*Jacob's Law. D. tit. Discontinuance.*)

"In order to prove a forfeiture, therefore, in the conveyance by McCrea, it should have been shewn to have been a feoffment with livery of seisin. As this mode of conveyance is nearly obsolete in England and very little used, and the more common species of assurance being lease and release and bargain and sale, we will not presume that a feoffment with livery was executed in this instance. It is equally probable that one of the other modes of conveyance was adopted, which, though in terms purporting to convey a fee, yet in reality transfer no more or greater estate than the grantor had. The fact, then, of a forfeiture is not satisfactorily shewn. But suppose the conveyance to have been a feoffment, 2. Did a right of entry accrue? and was the heir bound to enter? Littleton says, (*sect. 594.*) "If a man be seized of land as in right of his wife, and thereof enfeoff another and dieth, the wife may not enter, but is put to her action, the which is called *cui in vita.*" But this is altered, says Coke, since our author wrote, by the statute 32 Hen. 8. by the provision of which statute, the wife and her heirs, after the decease of her husband, may enter into the lands or tenements of the wife, notwithstanding the alienation of her husband.

"From what has already been said, and from the cases referred to, it would seem that the criterion of the forfeiture is the actually divesting of the estate of the remainderman or reversioner—the passing an estate which the grantor has no right to pass; and as the statute has interposed in this case to prevent such an effect from the feoffment of the husband, I think it follows that a feoffment in such case by the husband of his wife's estate does not work a forfeiture." (*2 Wend. Rep. 363 to 366.*)

"By the common law, a bargain and sale could not work a forfeiture or discontinuance of the estate; it being a general rule that no alienation which is not made by livery of seisin, or by that which is equivalent, can work a discontinuance." (*Per WILDE, J. delivering the Opinion of the Court.*) *Stevens et Uz. vs. Winship et Uz.* 1 Pickering's Rep. 327.

A conveyance in fee, by a tenant by the curtesy, although acknowledged and recorded, is not a forfeiture of his estate. *McKee's Lessee vs. Pfout*, 3 Dall. Rep. 488 489.

"and made by her on a private examination, apart from her husband. that she executed such deed freely without any fear or compulsion of her husband, which shall in like manner be contained in the certificate of



coverture, and the husband makes a feoffment in fee, and dies, the wife may enter under the provisions of this statute, although it was the inheritance of them both.(n)

(n) 1 Inst. 326, (a). *Greenley's case*, 8 Co. 142, (b)

"such acknowledgment, to be endorsed on such deed. But where any feme covert not residing in this state, shall join with her husband in any deed or conveyance, of or relating to any lands or real estate situated within this state, she shall thereby be barred of and from all claim of dower, and all other right and title therein, in like manner as if she were sole, and the acknowledgment or proof of such deed, conveyance or writing may be the same as if she were sole, and shall entitle such deed, conveyance or writing to be recorded as aforesaid." (36th Sess. Chap. 97, § 2. 1 R. L. [of New-York, 1813.] p. p. 369, 370.)

The "*Revised Statutes*," Part 2, Chap. 3, §§ 10 & 11, (Vol. 1, p. 758.) enact as follows.

"§ 10. The acknowledgment of a married woman residing within this state, to a conveyance purporting to be executed by her, shall not be taken, unless in addition to the requisites contained in the preceding section, she acknowledge, on a private examination, apart from her husband, that she executed such conveyance, freely, and without any fear or compulsion of her husband; nor shall any estate of any such married woman, pass, by any conveyance not so acknowledged."

"§ 11. When any married woman, not residing in this state, shall join with her husband, in any conveyance of any real estate, situated within this state, the conveyance shall have the same effect as if she were sole; and the acknowledgment or proof, of the execution of such conveyance by her, may be the same as if she were sole."

Where a wife joins with her husband in the execution of a deed of her own lands, but does not acknowledge the deed before a magistrate, according to the statute, her right is not divested. *Jackson ex dem. Carson & Al. vs. Cairnes & Al.* 20 Johns. Rep. 301. *Jackson ex dem. Sinsabaugh & Al. vs. Sears*, 10 Johns. Rep. 435.

A deed executed by a *Feme Covert* is not binding upon her, until acknowledged, and her subsequent acknowledgment does not relate back to the time of the acknowledgment of the deed. So, where a husband and wife execute a deed for land of the wife, but which she does not then acknowledge, and the husband and wife afterwards execute another deed of the same land, which is acknowledged by the wife, and the wife then acknowledges the first deed, the title to the land is vested in the grantee in the second deed. *Jackson ex dem. Stevens vs. Stevens*, 16 Johns. Rep. 110.

The certificate of the acknowledgment of a deed by a married woman, for the conveyance of her lands, under the act of the 24th February, 1770, [*Laws of Pennsylvania*, Chap. 616, § 2, Vol. 1, of Dallas' Ed. p. 536.] ought to state substantially, that she was separately examined, that she had a knowledge of the nature and consequences of the act she was about to perform, and that her will in the performance of it was free. Therefore a certificate merely stating, that she was of full age, and separately and apart examined, and the contents of the deed made known to her, without mentioning that she voluntarily consented to the execution of it, is insuff-

By the the statute of 11 Hen. VII. c. 20. it is also provided, \*that "if a woman has any estate-tail jointly with her husband, [\* 39 ] or only to herself, or to her use, in any lands or hereditaments of the inheritance or purchase of her husband, or given to the husband and wife in tail, by any of the ancestors of the husband, or by any other person seised to the use of the husband, or his ancestors, and shall hereafter, being sole, or with any other after-taken husband, discontinue, &c. the same, every such discontinuance shall be void, and it shall be lawful for every person to whom the interest, title, or inheritance, after the decease of the said woman, should appertain, to enter," &c.

This statute is, for the most part, confined to conveyances by the husband, or his ancestor, for the advancement of the wife.<sup>(o)</sup> Hence, if land be settled by the ancestor of the wife, in consideration of the marriage, it is not within this act; for it shall be intended that the advancement of the wife was the principal cause of the gift.<sup>(p)</sup> But, where the conveyance is by a stranger, in consideration of the wife's fortune paid by her father to the vendor, and other money paid by the husband, it is within the act.<sup>(q)</sup> So, if the conveyance be by the husband, or his an-

<sup>(o)</sup> *Foster v. Pitfall*, Cro. Eliz. 2. S. C. 1 Leon. 261.

<sup>(p)</sup> *Kynaston v. Lloyd*, Cro. Jac. 624.

<sup>(q)</sup> *Piggot v. Palmer*, Moore, 250.

sufficient. *Evans vs. The Commonwealth*, (IN ERROR.) 4 Serg. & R. Rep. 272. & *Vide Watson vs. Bailey*, 1 Binn. Rep. 470. *Thompson vs. Morrow*, 5 Serg. & R. Rep. 289.

But if the directions of the law are substantially complied with, it is not necessary that the prescribed form should be strictly pursued. *M'Intire vs. Ward*, 5 Binn. Rep. 301. *Shaller & Al. Admrs. vs. Brand*, 6 Binn. Rep. 435.

*Quere.* Whether it is necessary that it should appear on the face of the certificate that the contents of the deed were made known to the wife. *M'Intire vs. Ward*, 5 Binn. Rep. 296. 301.

Baron and feme have issue, and mortgage the lands of the feme, without acknowledging the same: the lands of the feme are bound only during the life of the husband. *James vs. Lyon*, 3 Yates' Rep. 471.

Parol declarations of the wife that she executed the deed voluntarily, and if it was not sufficient, would execute and acknowledge it again, or do any other act to make the deed good, are inadmissible in evidence. *See of Watson & Wife vs. Baily & Al.* 1 Binn. Rep. 470.

"A Feme Covert, can't pass her legal title without a deed, accompanied by privy examination, to evince that she does not do it under her husband's influence. And I presume a court of equity would require some equivalent testimony of her freedom of mind in parting with her equitable title." (PENDLETON, PRESIDENT, *delivering the Resolution of the Court*,) *Countz vs. Geiger*, 1 Call's Rep. 167,

cestor, in consideration of marriage, although it be joined with a money consideration, yet it is within the statute.(r) But no estate is within the meaning of this statute, unless it be for the jointure of the wife. Hence, although an estate devised by the husband to the wife in tail, with remainder over to a stranger in fee, be within the words, yet it is not within the meaning of the statute; for it shall not be intended to be

for a jointure, where no inheritance is reserved to the husband. [\* 40] band or his heirs, and the meaning of the statute is, that the wife shall not prevent the lands descending to the heirs of the husband.(s)

If the issue in special-tail, with reversion in fee expectant, levy a fine, and afterwards his mother, being tenant in tail within this act, make a lease for three lives (not warranted by the statute 32 Hen. VIII. c. 28.) living the issue; the conusee may enter.(t) But if the reversion in fee had been in another, the conusee could not enter, because he would have nothing but by estoppel; nor the heir, because he had concluded himself by the fine;(u) nor the issue.(v)

Formerly an alienation made by a sole corporation, as a bishop, or a dean, without the consent of the chapter, was a discontinuance; but since the disabling statutes,(w) which declare such alienations absolutely void, *ab initio*, no discontinuance can by such means be effected.(x)

## 2. BY DESCENT.(y)[1]

(r) *Kirkman v. Thomson*, Cro. Jac. 474.

(s) *Foster v. Pitfall*, Cro. Eliz. 2 S. C. 1 Leon. 261.

(t) *Brown's case*, 3 Co. 50, (b)

(u) *Ward v. Walthew*, Cro. Jac. 178.

(v) *Lincoln Coll. case*, 3 Co. 61, (a).

(w) 1 Eliz. c. 19. 13 Eliz. c. 10.

(x) F. N. B. 194.

(y) It is scarcely possible to suggest a case, in which the doctrine of descent cast

can be now so applied, as to prevent a claimant from maintaining ejectment, as, from the principles of disseisin at election, he may always lay his demise in the time of the ancestor, and elect not to be disseised; but a general account of the doctrine of descent cast is given here, in order to render this part of the subject complete. *Vide Taylor, d. Atkins v. Horde*, (Barr. 60.) where the history and

[1] Where the first possessor died, and a descent was cast, and the infant heirs were driven from the actual possession by a public enemy, the possession was considered, by the equity of the *jus postliminii*, as revested in the heirs on the removal of the hostile force. *Smith ex dem. Teller vs. Lorillard*, 10 Johns. Rep. 338.

Where a person dies possessed of land, it is *prima facie* evidence of title in his heirs by descent. *Smith ex dem. Teller vs. Lorillard*, 10 Johns. Rep. 355

"It has been decided in our Courts, that to constitute a Disseisin, upon

"Descents, which take away entries, are, when any one, seised by

principles of the doctrine of descent cast are. *Vide also William, d. Hughes, v. Thomas,*  
most ably investigated by Lord Mansfield. (12 East. 141. [2])

"which a descent may be cast, it must be commenced by wrong, and found  
ded on an ouster of the true owner. There must be a Disseisin in fact."  
*Doe ex dem. Arden & Al. vs. Thompson*, 5 Cow. Rep. 374. 6 Johns. Rep.  
216. 7 Wheat. Rep. 107.

"The Law will never construe a possession tortious unless from neces-  
sity. On the other hand, it will consider every possession lawful, the  
commencement and continuance of which, is not proved to be wrongful."  
*Ricard vs. Williams & Al.* 7 Wheat. Rep. 107—(Per STORY, J. delivering  
the Opinion of the Court.) *Sed Vide, Doe ex dem. Clark vs. Lane*, 1 Penn.  
Rep. 417, *Contra*, (ut semble.)

There cannot be an actual Ouster of a Reversion. *Doe ex dem. Trust-  
cott vs. Elliot*, 1 Barnew. & Ald. Rep. 86.

In an Ejectment, the plaintiff must shew, and it is sufficient if he does  
shew, a right of entry, or in other words, a right of possession. If he  
prove 20 years possession, or the seisin of his ancestor, and a descent cast,  
it is sufficient *prima facie*, and unless defendant shew a better right the  
plaintiff must succeed. *Hylton's Lessee vs. Brown*, 1 Wash. Circ. Ct.  
Rep. 204.

The Doctrine of "Descent cast" is abrogated by the "Revised Statutes"  
of New-York, Part 3, Chap. 4, Tit. 2, § 15, (Vol. 2, p. 295.)

"§ 15. The right of any person, to the possession of any real estate,  
shall not be impaired or affected, by a descent being cast in consequence  
of the death of any person in possession of such estate."

In the case of *Lessee of Rugge vs. Ellis* (1 Bay's Rep. 111.) WATIES,  
J., delivering the Opinion of the Court, said; "This action [Ejectment]  
has been allowed in this country, even where the right of entry has been  
toll'd by descent cast. It ought to be so—the rigid forms of ancient  
real actions have long since been mouldering away, and giving place to  
others, more liberal and better calculated to answer the ends of justice."

[2] "The distinction between a disseisin by election, as contradistinguish-  
ed from a disseisin in fact, was taken for the benefit of the owner of the  
land, and to extend to him the easy and desirable remedy by assize, in-  
stead of the more tedious remedy by a writ of entry. Whenever an act  
is done which of itself works an actual disseisin, it is still taken to be an  
actual disseisin, as if a tenant for years, or at will, should enfeoff in fee.  
On the other hand, those acts which are susceptible of being made dis-  
seisins by election are no disseisins till the election of the party makes  
them so, as if a tenant at will, instead of making a feoffment in fee,  
should only make a lease for years." *Jackson ex dem. Van Allen vs. Ro-  
gers*, 1 Johns. Cas. 36, 37. (Per KENT, J.) *Ibid.* 43.

"Making a devise has been deemed an intimation of an election not to  
be disseised. (*Powley vs. Blackman*, Palm. 205. Cro. Jac. 659.)"—1  
Johns. Cas. 37, 44. 2 Caines' Cas. Er. 316.

"The conveyance in fee of the tenant was a disseisin of the landlord,  
or not, at his election. For the sake of his remedy, he had a right to con-  
sider the grantee a disseisor. But he cannot constitute himself a dissei-

any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir : in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken

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"sor in spite of his landlord." *Jackson ex dem. Van Schaick & Al. vs. Davis*, 5 Cow. Rep. 134.—(Per SUTHERLAND, J. delivering the Opinion of the Court.)

"It has also been argued at the bar, that a person who commits a disseisin cannot qualify his own wrong, but must be considered as a disseisor in fee. This is generally true ; but it is a rule introduced for the benefit of the disseisee, for the sake of electing his remedy. For if a man enter into possession, under a supposition of a lawful limited right, as under a lease, which turns out to be void, or as a special occupant, where he is not entitled so to claim, if he be a disseisor at all, it is only at the election of the disseisee. (*Com. Dig. Seisin. F. 2 & F. 3. 1 Roll. Abrid. 662. l. 45. Id. 661. l. 45.*) There is nothing in the law which prevents the disseisee from considering such a person a mere trespasser, at his election ; or which makes such an entry, under a mistake for a limited estate, a disseisin in fee absolutely, and, at all events, so that a descent cast would toll the entry of the disseisee." *Ricard vs. Williams*, 7 Wheat. Rep. 107, (Per STORY, J. delivering the Opinion of the Court.)—& Vide, *Proprietors of Kennebeck Purchase vs. Call*, 1 Mass. Rep. 488. *William, Lessee of Hughes & Uz. vs. Thomas*, 12 East. Rep. 152.

"Where there has been an actual disseisin, the disseisee cannot elect to consider himself as not disseised. *Davis & Uz. vs. Martin*, 3 Munf. Rep. 285.

In the case of *Prescott & Al. vs. Nevins & Al.* (4 Mason's Rep. 326, 329.) STORY, J. delivering the Opinion of the Court, said ; "There is a distinction between disseisins, which are in spite of the owner, and disseisins at his election. But the distinction often turns upon other principles than those which have been stated. The owner cannot elect to consider himself disseised, where the act is not of such a nature as, in law, affords a presumption of a disseisin. But where an act is done, which is equivocal, and may be either a trespass or disseisin, according to the intent, there the law will not permit the wrongdoer to qualify his own wrong, and explain it to be a mere trespass, unless the owner elects so to consider it."

In the case of *Varick & Al. vs. Jackson ex dem. Eden & Al.* IN ERROR, (2 Wend. Rep. 166.) WALWORTH, Chancellor, who delivered the unanimous Opinion of the Court, said ; "But the principal question in this cause is as to the validity of the devise of Medceff Eden the younger. Two kinds of disseisin are mentioned in the English law books. The one was a disseisin in fact, which actually changed and divested the seisin of the original owner of the freehold, and deprived him of all right in relation thereto, except the mere right of entry and of property ; and which, under certain circumstances, was still further reduced to a mere right of action, the right of entry being lost."

"By this species of disseisin the wrong doer acquired a fee simple, and the actual seisin of the property, together with nearly all the rights of the real owner ; and all estates depending on the original seisin were divested or displaced. The other kind of disseisin was called disseisin by

away; and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate. And this, first, because the heir comes to the estate by act of law, and not by his own act; the law, therefore, protects his title, and will not suffer his possession to be divested, till the claimant hath proved a better right. Secondly, because the heir may not suddenly know the true state of his title; and, therefore, the law, which is ever indulgent to heirs, takes away the entry of such claimant as neglected to enter on the ancestor, who was well able to defend his title; and leaves the

"election, because the owner might elect to consider himself disseised for the sake of the remedy by action of *novel disseisin*; but if he did not elect to consider himself disseised, the freehold was not divested, but still continued in him. (*Blenden vs. Baugh*, *Cro. Car.* 302.)

"Disseisin *in fact* and disseisin by *election* have been so frequently confounded, that, in examining the *dicta* of judges, it is sometimes difficult to understand to which species of disseisin they allude, without referring particularly to the facts of the case which they had under consideration at the time such *dicta* were delivered. But by a careful examination of the authorities, it will be found that there could be no disseisin *in fact*, except by the wrongful entry of a person claiming the freehold, and an actual ouster or expulsion of the true owner, or by some other act which was tantamount; such as a common law conveyance, with livery of seisin, by a person actually seised of an estate of freehold in the premises; or some one lawfully in possession representing the freeholder, (1 *Instit.* 330, *C. note* 1;) or by a common recovery, in which there was a judgment for the freehold, and an actual delivery of seisin by the execution, or by levying a fine, which is an acknowledgment of a feoffment of record. (2 *Bl. Com.* 348. *Co. Litt.* 330, *C. note* 1. *Doe vs. Thompson*, 5 *Cowen's Rep.* 371. *Smith vs. Burtis*, 6 *Johns. Rep.* 197.)

"In this case there was no expulsion of the tenant of the freehold, and Medcef Eden the younger did no act which could possibly be construed into an election to consider himself disseised. When Boyd took possession of the premises in 1805, it was during the life of Joseph Eden, and of course before the happening of the contingency which afterwards divested the estate acquired under the conveyances of the first of September, 1804, and the first of May, 1805. By those conveyances Boyd acquired all the right of Joseph Eden, which was an estate in fee, subject, however, to be defeated by the death of Joseph without issue, during the life-time of Medcef. His entry, therefore, was congeable, and divested no estate. None of the conveyances executed during the life of Joseph Eden were common law conveyances, with livery of seisin, and of course divested no rights but those of the grantors. By the death of Joseph Eden in 1813, the title vested in Medcef; and the holding over of the person in possession, after the termination of his estate in the premises, could not be a disseisin of the rightful owner. After that time, the rights of the parties were not altered previous to the death of Medcef Eden. There was then nothing to prevent the operation of his will, unless the bare holding over of a tenant for life, after the determination of his estate, and claiming the fee, can have that effect."

claimant only the remedy of an action against the heir. Thirdly, this was admirably adapted to the military spirit of the feudal tenures, and tended to make the feudatory bold in war; since his children could not, by any mere entry of another, be dispossessed of the lands whereof he died seised. And, lastly, it is agreeable to the dictates of reason, and general principles of law.”(z)

This doctrine of descent cast does not apply, if the claimant be under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; because, in all these cases there is no neglect or laches in the claimant, and, therefore, no descent shall bar or take away his entry.(a) Nor does it affect copyhold, or customary estates, where the freehold is in the lord;(b) nor cases where the party has not any remedy but by entry, as a devisee.(c)

[ \*42 ]      \*The right of entry may be tolled, or taken away, by a descent cast, in cases of abatement, intrusion, and disseisin.[1]

(z) 3 Blk. Com. 176.

(a) Litt. l. 3. c. 6.

(b) *Doe, d. Cook v. Danvers*, 7 East, 229.

(c) Co. Litt. 240, (b).

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[1] “Disseisin is an estate gained by wrong and injury; and therein it differs from dispossession which may be by right or wrong. This is the uniform language of the best authorities from the time of *Littleton*. (*Litt. s.* 279. *Co. Litt.* 3 b. 18 b. 153 b. 181 a. *Cro. Jac.* 685. 1 *Salk.* 246 n. “2. 1 *Burr.* 109.”) *Per KENT*, Ch. J. *delivering the Opinion of the Court in Smith ex dem. Teller & Al. vs. Burtis & Al.* 6 *Johns Rep.* 217. *Doe ex dem. Arden & Al. vs. Thompson*, 5 *Cow. Rep.* 374.

If A. be tenant of the freehold, and B. tortiously enter upon, and turn the sub-tenant of A. out of possession, claiming the land as his absolute Property; and he, or those claiming under him, continue to hold the same, by actual adverse Possession, until the death of A., this is an actual Disseisin of A.—*Davis & Uz. vs. Martin*, 3 *Munf. Rep.* 285.

Where one had driven piles in the ground which was covered by a Mill-pond belonging to another, and had erected and maintained buildings on the said piles for sixty years, the water flowing between the piles, it was held to constitute a Disseizin of the Owner of the Mill-pond, and he was barred of his right to the land so occupied.—*Boston Mill Corporation vs. Bulfinch*, 6 *Mass. Rep.* 229.

If a man enters upon land under a Deed duly registered, though from one having no legal title to the land, and has a visible possession, occupancy, and improvement of only a part of it, such occupation and improvement, unless controlled by other facts, is a disseisin of the true owner, as to the whole tract; because the extent and nature of his claim may be known, by inspection of the public Registry; for the 6th Section of the Act of Limitation, of Maine, Ch. 2. was enacted to abolish the distinction existing

\*By the common law, if an abator, or intruder, or disseisor, [\*43] died in peaceable possession, the descent to the heir gave to

between a possession under a *Deed recorded*, or a possession without such title.—*Proprietors of Kennebec Purchase vs. Luboree & Al.* 2 Greenl. Rep. 275, & *Vide* (S. P.) *Little vs. Megquier.* Ibid. 176.

In the case of *Small vs. Procter*, (15 Mass. Rep. 498) WILDE, J. delivering the Opinion of the Court, said—"Whatever may have been the ancient doctrine of disseizin, in relation to feudal tenures, it has, ever been held in this State, that an entry on vacant or uncultivated land, by one claiming to hold it, having no right, and without permission of the Owner, accompanied with occupation or open visible possession, is sufficient to constitute a disseizin. This principle has been too frequently recognized to be now controverted. (4 Mass. Rep. 416. 6 Mass. Rep. 229. 14 Mass. Rep. 200.)

"Disseizin does not necessarily imply a forcible entry, or an actual ouster by violence or fraud: for in cases of vacant possessions, a simple tortious entry and open exclusive possession under claim of adverse title, are equivalent to such entry and ouster."—& *Vide Hall & Al. vs. Powel*, 4 Serg. & R. Rep. 465.

"A mere entry upon another is no disseisin, unless it be accompanied with expulsion, or ouster from the freehold."—*Smith ex dem. Teller & Al. vs. Burtis & Al.* 6 Johns. Rep. 217 (Per KENT Ch. J. delivering the Opinion of the Court. (Doe ex dem. Arden & Al. vs. Thompson, 5 Cow. Rep. 374. (Per WOODWORTH, J. delivering the Opinion of the Court.) *Jackson ex dem. Van Alen vs. Rogers* 1 Johns. Cas. 36. & *Vide Jackson ex dem. Hardenbergh & Al. vs. Schoonmaker*, 4 Johns. Rep. 390.—*Simpson & Al. vs. Shannon's Heirs*, 3 Marsh. Rep. (Ky.) 463. *Norcross, Executrix vs. Widgery*, 2 Mass. Rep. 508.—*Jackson ex dem. June vs. Raymond*, 1 Johns. Cas. 86. (note.)

"A peaceable entry upon Land, apparently vacant, furnishes per se, no presumption of wrong." 6 Johns. Rep. 218.—5 Cow. Rep. 374.

The Disseisor is "bound to shew his tortious seisin affirmatively." 5 Cow. Rep. 374.—6 Johns. Rep. 118.

Where the entry is congeable, it cannot work a Disseisin. *Ricard vs. Williams & Al.* 7 Wheat. Rep. 107. 6 Johns. Rep. 218. *Higginbotham & Al. vs. Fishback*. 1 Marsh. Rep. (Ky.) 506. 6 Johns. Rep. 218.—5 Cow. Rep. 374. *Jackson ex dem. Van Alen vs. Rogers*, 1 Johns. Cas. 37. 47.—*Jackson ex dem. June vs. Raymond*, Ibid. 86. (in note.) & *Vide Brown vs. Porter*, 10 Mass. Rep. 100.

Tenant for life levied a fine, and afterwards devised the premises, and died seised; the Devises (the Defendant in Ejectment,) entered and continued in possession; and his counsel contended that this case fell within the definitions of a Disseisin which had been referred to from *Littleton* and *Lord Coke*. But LORD ELLENBOROUGH, Ch. J. answered him thus. "All the Definitions include an Ouster of the tenant, a wrongful putting of him out: and there lies your difficulty: there is an entry of the one party, but what ouster or putting out of the other is there?"—*Williams, Lessee of Hughes & Uz. vs. Thomas*, 12 East's Rep. 141, 152.

If the original entry of a Party were lawful or congeable, no subsequent



him a right of possession, and took away from the true owner his right

act of his whilst continuing in the possession acquired by such entry, can amount to a *technical* actual *Disseisin* of the true owner.

In the case of *Doe ex dem Davis vs Davis*, (1 Car. & P's. Rep. 130.) the Plaintiff was the eldest, and the Defendant the second son of a Mr. Davis, who was seized in fee of the house for which the present ejectment was brought. It appeared that the Defendant had lived with his father for some time previous to his death, at the house in question, and continued to reside in the house after the father's death, when he levied a fine with proclamations, which was proved; and the Defendant's counsel contended, that he must succeed, as there had been no actual entry by the lessor of the Plaintiff; but PARK, J., considered such entry unnecessary, as the second son merely continued in the house he had rightfully resided in during his father's lifetime; and that he was not seized of the freehold rightfully, or by disseisin. His lordship therefore directed a verdict for the Plaintiff.

A rule *nisi* for a new trial having been obtained, and the case argued in the Court of Exchequer—

GRAHAM, B., now delivered the Opinion of the Court. "In this case a second son is left in possession at the death of his father, and levies a fine. The question is, whether he has a freehold by disseisin. A person, to levy a fine, must either have a freehold by right or by wrong. And if by wrong, the cases show, that the possession must be adverse. There must be a wrong in the original entry. Now here the Defendant was permitted to enter by his father which is clearly not a tortious entry; and in *Doe vs. Perkins*, Lord ELLENBOROUGH and the rest of the Court Held, that if a man held over on a lease, and a descent was cast, the entry was not tolled; because the possession of the Defendant's ancestor did not originate tortiously. We are therefore of opinion, that the present Defendant's possession was not a disseizin of the freehold." Rule discharged.

In the case of *The Proprietors of the Kennebec Purchase vs. Springer* (4 Mass. Rep. 418. 419.) PARSONS, Ch. J. delivering the Opinion of the Court, said: "When a man not claiming any right or title to the Land shall enter on it, he acquires no seizin, but by the ouster of him who was seized, and he is himself a disseizor. To constitute an ouster of him who was seized, the disseizor must have the actual exclusive occupation of the Land, claiming to hold it against him who was seized, or he must actually turn him out of possession. When a disseizor claims to be seized by his entry and occupation, his seizin cannot extend farther than his actual exclusive occupation; for no farther can the party seized be considered as ousted; for the acts of a wrongdoer must be construed strictly, when he claims a benefit from his own wrong."

"On considering the evidence we are satisfied that the Demandants were not disseized until 1792, by the entry of the Tenant: that the running round the Land by a Surveyor, and marking the lines, by the direction of one who claims no title to the Land, is not such an exclusive occupation of the Land as can amount to an ouster or disseizin of the Demandants. Neither can the occasional cutting of the grass on the meadow by Springer, who does not appear to have claimed the Land, amount to disseizin."

"To constitute a disseizin of the Owner of uncultivated Lands, by the

of entry, although such death happened immediately after the wrongful

"entry and occupation of a Party not claiming title to the Land, the occupation must be of that nature and notoriety, that the Owner may be presumed to know that there is a possession of the Land adverse to his title: "otherwise a man may be disseized without his knowledge, and the Statute of Limitations may run against him, while he has no ground to believe that his seizin has been interrupted."—*Vide Watrous vs. Southworth*, 5 Conn. Rep. 305, 311.

In the case of *Pray vs. Pierce*, (7 Mass. Rep. 381, 383.) The tenant read in evidence a Deed from one *James Witherill*, a Collector of Taxes, to one *Charles Clark*, dated October 18th, 1791, duly executed and recorded December 15th, 1792, wherein for the consideration of, &c. the said Collector granted, &c. the demanded premises in fee, saving to the owner the right of redeeming the same.

There was no evidence that the said Collector had conformed to the requirements of the law, in relation to the sale of the land; *Clark*, under colour of the said conveyance, fenced the land and depastured his cows upon it; he demised it by parol to the tenant, *Pierce*, who occupied it, under the said demise from the year 1798, to the time of trial, at October Term, 1810.

The Demandant showed a regular chain of title to the demanded premises, by sundry conveyances (commencing in the year 1779) down to *Ivory Hovey*; and also a Quit-claim Deed, dated February 1st, 1793, duly executed, and recorded June 24th 1794, wherein the said *Hovey* in consideration, &c. conveyed the demanded premises, together with other parcels of Land to the Demandant, *Pray*.

On the trial a verdict was rendered for the Demandant, and upon a motion for a new trial upon Exceptions taken by the tenant, the Court said—"Another exception is, that at the time when *Hovey* conveyed to *Pray*, the Demandant, *Hovey* was disseised by *Clark*, under whom the tenant claims.

"This objection must depend upon the facts which are in the Case. From *Hardison's* testimony it is in evidence, that he had the care of the Land for *Hovey*, until he understood that *Hovey* had made a conveyance of it to the Demandant. To control this testimony, the tenant has produced to us testimony that *Clark*, previous to the conveyance from *Hovey* to the Demandant, had under color of the Collector's conveyance to him, fenced the Land, and depastured his cows upon it. But there was no evidence that *Hovey* had any notice of these acts of *Clark*. Unquestionably had *Clark* had a good title, and had he under that title done those acts, it would have been good evidence of a legal seisin in him. But as nothing passed by the Collector's deed to him, those acts of his must be deemed to be trespasses. But they cannot amount to an ouster of *Hovey*, until evidence that *Hovey* had notice of them. Otherwise a private act of trespass on the soil of another might be evidence of an ouster, without any knowledge on the part of the owner of the Land. This notice may be proved either by direct evidence of the fact; or the Jury may presume it from circumstances in evidence; as when it is proved that the owner's Cattle have been turned off the Land, or his servant's refused an entry, &c.; or a continuance of the trespass for a long time is shewn, when the Owner or his Agent lives in the neighbourhood. But

acquisition of the lands ; but by the statute of 32 Hen. VIII. c. 33. it is

"whatever may be the evidence of this notice, it is a fact to be found by the Jury, and the Court cannot presume it. And as, in the case before us, this notice is not stated as a fact proved, *Hovey* must be considered as seised at the time of his conveyance to the Demandant : and so this objection fails."

In the case of *William, Lessee of Hughes & Uz. vs. Thomas*, (19 East Rep. 154, (Lord ELLENBOROUGH, Ch. J. said—"Now here tenant for life levied a fine, and continued in possession till her death ; having devised to the defendant, who after her death, entered and continues in possession ; and this is contended to be of necessity a disseisin : but what act has he done to make him a disseisor ? The lessor of the plaintiff never was in possession, and therefore could not be disseised or put out of possession. It does not even appear that the defendant was cognizant of the claim of the lessor. Disseisin was formerly a notorious act, when the disseisor put himself in the place of the disseisee as tenant of the freehold, and performed the acts of the freeholder, and appeared in that character in the Lord's Court. But what act of notoriety is here stated to have been done by the defendant, as claiming to put himself in the place of the rightful freeholder ? It would be carrying the doctrine of disseisin further than any other case has done, to say, that the mere taking of the rents and profits, as devisee of the land, is a disseisin, without meaning to do this adversely to the party entitled ; for it does not even appear that when he entered he knew of the lessor's claim."

To constitute a disseisin, the possession of the Disseisor must have been adverse to the Title of the true Owner, as well as open, notorious, and exclusive.—*Little vs. Libby*, 2 Greenl. Rep. 242.

"After a Mortgage, if the Mortgagor remains in possession, it is not a disseisin of the Mortgagee."—*Gould vs. Newman*, 6 Mass. Rep. 241 (Per PARSONS, Ch. J. delivering the Opinion of the Court.)

Where one enters upon land under a Deed duly acknowledged and recorded, he acquires a freehold either by right or wrong : if by wrong, it is an actual disseisin of all claiming the land under a different title.—*Higbee & Al. vs. Rice*, 5 Mass. Rep. 344.

An entry on land under a Deed recorded, and payment of taxes, is no evidence of a Disseisin of the true owner, unless the person who entered has continued openly to occupy and improve it.—*Little vs. Megquier*, 2 Greenl. Rep. 176.

"And it is also to be observed, that the acts of disseisors are, in respect to the lawful owner or true proprietor, to be limited to an actual ouster and exclusive occupation of such disseisors, and shall not be extended by construction according to their claims under invalid deeds or other conveyancing."—*Brimmer vs. the Proprietors of Long Wharf*—5 Pickers. Rep. 135. (Per PUTNAM, J. delivering the Opinion of the Court.)

One joint-tenant cannot convey a part of the land holden in joint-tenancy by metes and bounds to a stranger, nor can one entering under such a conveyance be a Disseisor of the other joint-tenants ; for one joint-tenant cannot be disseised by a stranger unless all are disseised, and the Grantor was not disseised, as the Grantee entered by his consent. The Grantee in such a conveyance therefore gains no seisin either by right or by wrong.—*Porter vs. Hill*, 9 Mass. Rep. 34.

provided, that "the dying seised of any disseisor of and in any lands,

A conveyance by a Disseisee is unlawful and void, but the title remains in the grantor; so that in a writ of entry, the tenant cannot plead that the Demandant, after the Disseisin, made such an unlawful conveyance, and that the action is brought at the expense and for the use of the grantee in pursuance of an unlawful agreement between him and the Grantor.—*Brinley vs. Whiting*, 5 *Piker. Rep.* 348.

"A Disseisin may be purged either by the Disseisor's abandonment of the "possession, or his consent to hold under the Disseisee."—*Small vs. Procter*, 15 *Mass. Rep.* 493. (*Per WILDE, J. delivering the Opinion of the Court.*)

Whether an Infant can be disseised, and is then bound to bring his action within ten years after coming of age?—*Quære, Jackson ex dem. Rensselaer vs. Whitlock*, 1 *Johns. Cas.* 213.

There can be no Disseisin of an equitable estate.—*Marquis Cholmondeley & Al. vs. Lord Clinton & Al.*, 2 *Meriv. Rep.* 361.

In the State of *Maine*, "Where a person enters into possession under "a recorded deed claiming title to the entirety, and exercises acts of ownership, it is a disseisin of all persons who claim title to the same land to "the extent of the boundaries in the deed." *Prescott & Al. vs. Nevers & Al.* 4 *Mason's Rep.* 326.

"After a sale of land by articles of agreement and payment of the purchase money, the vendee died, and his wife and children left the land: "the vendor placed a tenant on it, and the possession continued in him and "those claiming under him, twenty-one years; *Held*, that it was erroneous "to charge the jury that the putting on the tenant was not an ouster, unless "they believed that the vendor intended to commit an ouster." *Pipher & Another vs. Lodge & Others*, 16 *Serg. & R. Rep.* 214.

"There can be no legal doubt, that one tenant in common may disseise another. The only difference between that and other cases is that "acts, which, if done by a stranger, would *per se* be a disseisin, are, in "the case of tenancies in common, perceptible [susceptible?] of explanation, consistently with the real title. Acts of ownership are not, in tenancies in common necessarily acts of disseisin. It depends upon the intent, "with which they are done, and their notoriety. The law will not presume "that one tenant in common intends to oust another. The fact must be notorious, and the intent must be established in proof." *Prescott & Al. vs. Nevers & Al.* 4 *Mason's Rep.* 330, (*Per STORY, J. delivering the Opinion of the Court.*)

A disseisin may be effected without the actual knowledge of the owner of the land; acts of notoriety, such as putting a fence round the land or erecting buildings upon it, being constructive notice to all the world. *Peignard vs. Smith*, 6 *Picker. Rep.* 172.

Successive disseisins do not aid one another in creating a title by possession. Thus where a disseisor conveys part of the land, and the grantee, under colour of the deed, enters upon the whole, the possession of the first disseisor will not avail the grantee, in regard to the part not embraced by the deed. *Ward vs. Bartholomew*, 6 *Picker. Rep.* 409.

The question of *Disseisin*, is to be left to the decision of the jury.

In the case of *Jackson ex dem. Van Alen vs. Rogers*, 1 *Johns. Cas.* 49.

&c. having no title therein, shall not be deemed a descent, to take away the entry of the person, or his heir, who had the lawful title of

[ \*44 ] entry at the time of the descent, \*unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled.”[1] This statute, however, being a penal one, is construed strictly, and does not extend to the feoffee, or donee of the disseisor, mediate or immediate, and, therefore, the descent in such cases remains as at the common law.(d) It is also said, that abators and intruders are not within the statute : but the successors of bodies politic and corporate in cases of disseisin are within its remedy, although the statute speak of him, that at the time of such descent had title of entry, or *his heirs* ; for the statute clearly extends to the predecessor, being disseised, and, consequently, without naming his successor, extendeth to him, for he is the person that, at the time of such descent, had title of entry.(e)

If there be tenant for life, the reversion in fee, and tenant for life be disseised, and die, and the disseisor afterwards die within five years, the reversioner is within the benefit of the statute, and his entry is not taken away ; for, after the death of the tenant for life, it is a continuation of the same disseisin to the reversioner. But if the disseisor had died seised, and the tenant for life had afterwards died, there the descent would have taken away the entry of the reversioner, because there was no continuation of the same disseisin upon the reversioner. The act only continues a right of entry in the disseisee, where a right of entry was *once in him* ; but in the last case a right of entry never was in the reversioner, and consequently never having had the right of possession, he is not a disseisee within the statute, to punish the possession of the heir as an actual ouster, \*since the reversioner was never actually ousted either by the original disseisor, or his heir.(e)

(d) Co. Litt. 256.  
(e) Co. Litt. 238. *Wimbish v. Tailbois*, Plow. 38. 47.

Lewis, J. said, “ The reference of *Holland's* interest to the jury was right upon every principle. Whether he was or was not a disseisor, is not, as has been mistakenly supposed, a question of law, but of fact. *Disseisin*, says Lord Mansfield, in the case last cited. (*Taylor ex dem. Atkyns v. Horde*), is a fact to be found by a Jury.”

[1] The Laws of New-York, (24th Sess. Chap. 183, § 4, 1 R. L. 126,) contained the like provision. The “ *Revised Statutes* ” have entirely abrogated the doctrine of *Descent cast*. Vide *supra*, p. 40, n. [1]

It is immaterial whether the descent be in the collateral line or lineal; (f) but a dying seised of an estate for life, or of a reversion, or remainder, will not take away an entry; (g) because, for this purpose, it is essentially necessary that the disseisor should die seised both of the fee or fee-tail and freehold. If, therefore, the disseisor make a lease for his own life, or the life of another, and die seised of the reversion, this descent will not take away the entry, because, although he had the fee, he had not the freehold at the time of his death; but if he make a lease for years and die seised of the reversion, the entry will be taken away, for the fee and freehold are both in him. The law is the same in the case of a remainder, and when the land is extended upon a statute, judgment, or recognizance. (h)

It is also necessary, that the descent of the fee and freehold be immediate to bar the entry. Hence, if some disseisoreess take husband, and have issue, and afterwards the husband die, such descent will not take away the entry of the disseisee, because the heir comes not to the fee and freehold at once, the latter having been suspended until the death of the father, who was tenant by the curtesy. (i)

To constitute a descent, therefore, which shall take away an entry, it appears, that there must be a dying seised in demesne of a corporeal inheritance, either in fee or fee-tail, that the rightful owner be under no legal disability in the time of the ancestor, and also in those cases \*to which the statute of 32 Hen. VIII. c. 33. extends, [\*46] that the disseisor have five years quiet possession of the lands.

### 3. BY THE STATUTE OF LIMITATIONS.

By the statute of 21 Jac. I. c. 16. s. 1. [1] it is enacted, that "no per-

(f) Co. Litt. 330, (b)  
(g) Litt. s. 287, 288.

(h) Co. Litt. 220, (b)  
(i) Litt. s. 304.

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[1] This Statute appears to be the model after which the Statutes of Limitations in most of the States of the American Union have been framed. The *Times* of limitations, however, are variant in many of the States. The following is a Summary of their provisions as to rights of Entry, and Actions for the recovery of Land.

#### ALABAMA,

1. No Entry to be made into lands but within 20 years after right or title accrued.

2. Real, possessory, ancestral, mixed or other action for lands, to be commenced within 30 years next after right or title thereto, or cause of action accrued.

son shall make any entry upon any lands, &c. but within twenty years

*Proviso.* That the Time during which the person who has such a right of entry or of action, shall have been under 21 Years of Age, Feme Covert, or Inasne, shall not be computed part of the period of Limitation.

#### CONNECTICUT.

"An act for the Limitation of civil actions, and of criminal prosecutions." (*Revision of 1821, Title 59. Limitations.*)

1st Section *enacts*, That no person shall make entry into lands, &c. but within fifteen years next after his right or title shall first descend or accrue to the same. And no such entry shall be sufficient, unless an action shall be commenced thereupon and prosecuted with effect, within one year next after the making thereof.

*Proviso.* in favour of any person who "at the time of the first descending or accruing of the said right or title," is an *Infant, Feme Covert, Lunatic, or Prisoner*, "so as such person shall, within five years next after full age, discoverture, coming of sound mind, enlargement out of prison, or the heirs of such person, shall within five years after the death of such person, bring such action or make such entry, and take benefit of the same."

#### DELAWARE.

Act of 19th June, 1793. (*Laws, Vol. 2, p. 1155, Ch. 40, §1.*)

Sect. 1. *Enacts*, That no person shall make entry into Lands, &c. but within twenty years after his right or title first descended or accrued. Nor shall any person have any writ of right, or any action, real, personal or mixed, for, or make any prescription to or in any lands, &c. but only upon an actual seissin or possession of himself, his ancestor or predecessor, within twenty years next before suit brought. "*Provided nevertheless*, That any person or persons now having right or title of entry, and the heirs of such person or persons, may, within ten years from this time proceed as might have been done heretofore: And *provided also*, That if any person having right or title of entry, was and now is, or if any person hereafter having right or title of entry, shall be at the time of such right or title first descended or accrued, an *Infant, Feme Covert, Non Compos Mentis*, or a Prisoner, then, but in no other case whatever, except as before provided, such person, or the heirs of such person, may within ten years next after the removal of such disability, but not afterwards, proceed, notwithstanding the said twenty years be expired, as might have been done before the same were expired, and if any such person shall die under any of the disabilities aforesaid, the heirs of such person shall have the like benefit that such person might have had by living till the disability had ceased."

Act of 2d February, 1811. (*4th Vol. 459. 463, Ch. 158.*)

Section 22. *Repeals* all savings in favour of persons beyond sea, or out of the State, and *enacts*, that they shall bring their actions within the same times as other persons for whom no saving is given.

#### GEORGIA.

Limitation of all suits for real estate and for entry on lands, seven years after title and cause of action shall accrue.

*Proviso*, Saving the rights of *Infants, Femes Covert, Persons Non Compos, imprisoned, and beyond Seas.*

next after his right or title shall first descend, or accrue, and, in default

### ILLINOIS.

(*First Session, Third General Assembly ; Act of February 18, 1823.*)

Limitation of "action of Ejectment, writ of right, or other action for the recovery of any lands," &c. and of any avowry or cognizance thereof, ten years.

*Proviso*, Saving to *Infants, Femes Covert, Persons Insane, or imprisoned*, their right, so as they or their heirs commence their actions within five years after disability removed.

In case of *disseisin*, descent cast, will not toll right of entry without *ten years peaceable possession*.

### INDIANA.

No statutory provision on the subject of real actions. Limitation in action of Ejectment, twenty years.

### KENTUCKY.

Limitation of *Writs of Right* upon the seisin or possession of the ancestor or predecessor of the demandant, fifty years.

Any other *possessory* action upon the possession or seisin of the ancestor or predecessor of demandant, forty years.

Any real action upon the demandant's own possession or seisin, thirty years.

And there are no savings in favour of infants or any others.

Limitations of writs of *Formedon in Descender, Remainder, or Reverter*, twenty years.

*Of Entry into Lands*, twenty years.

*Proviso*, Saving the rights of *Infants, Femes Covert, persons Non Compos Mentis, or imprisoned*, and their heirs; so as they bring and maintain their action, or make their entry within ten years next after such disabilities removed, or the death of the person so disabled. (*Persons "not within this Commonwealth," were also originally included in the saving, until the Act of January 22, 1814.*)

An act passed February 9, 1809, commonly called the "ten years' act," bars claims after ten years, where the claim is set up under or by an adverse interfering entry, survey, or patent, against one who had actually settled thereon (the premises) *before the passage of the Act*, and to which at the time of settlement such person had a connected Title in Law or Equity deducible from the *Commonwealth*. And where such title is acquired *after* the settlement made, the limitation is to run from the *Time* of such acquirement: and where possession acquired as above, has been transmitted by sale or other legal act of conveyance, the purchaser, &c. is entitled to the same benefit of the act to which the vendor was entitled.

*Exceptions*. This act shall not extend to *Infants, Feme Covert*, or to persons of *unsound Mind*; nor to persons *out of the United States*, in the service of the United States or this state; but such persons have seven years within which to sue after the disability removed, or after the expiration of their employments beyond the limits of the United States; and where the limitation shall have *begun to run, and the Right or Title shall by the Act of God or the Operation of Law, be cast upon any person with-*



thereof, such person so not entering, and his heir, shall be utterly dis-

in the Time of such disabilities and exceptions, the time of such disability or privilege shall not be computed as part of the Limitation.

By an act of January 22, 1814, it is declared, that persons whose causes of action accrue while they are *out* of this Commonwealth, shall by the Courts of the same in every description of action relating to the title or possession of *Land*, be considered in the same light and no other or better than the citizens of this Commonwealth.

And that *Femes Covert*, upon whom lands have descended or to whom they shall have been devised by will *during coverture*, and in no other case, shall be allowed three years only after discovery: And *Infants*, and *Persons Non Compos Mentis*, only *three Years*, after the disabilities removed.

The time between April 12, 1774, and April 12, 1778; and between January 1, 1781, and January 1, 1782; and between May 5, 1783, and October 20, 1783, are not to be accounted in any case as part of the period of Limitations.

#### LOUISIANA.

This State has properly speaking no *Statute of Limitations*; the law of "*Prescription*" in use in this State is derived from the Civil Law, and differs from the English and American Statutes in this, that while those Statutes only *bar the Remedy* of the true owner, without extinguishing his right; the law of *Prescription* of Louisiana, bars both remedy and right: and moreover vests a right in the occupant, however wrongfully his possession may have been acquired. The following extracts from the "*Civil Code of the State of Louisiana*," indicate the difference between it and the several Statutes of Limitations in force in this country, and in Great Britain.

#### TITLE 23, CHAPTER 2.

"Art. 3414. The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another."

"Art. 3415. The possessor in bad faith is he who possesses as master, but who assumes this quality, when he well knows that he has no title to the thing, or that his title is vicious and defective."

#### TITLE 23, CHAPTER 3, SECTION 1.

"Art. 3420. Prescription is a manner of acquiring property, or discharging debts, by the effect of time, and under the conditions regulated by law.

Each of these prescriptions has its special and particular definitions."

"Art. 3421. The prescription, by which property is acquired, is a right by which a mere possessor acquires the property of a thing which he possesses, by the continuance of his possession during the time fixed by law."

"Art. 3422. The prescription by which debts are released, is a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time without urging his claim."

abled from such entry." Section the second enacts, "that if any per-

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TITLE 23, CHAPTER 3, SECTION 2. § 1.

"Art. 3450. By the term *just title*, in cases of prescription, we do not understand that which the possessor may have received from the real owner, for then no prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the property."

"Art. 3451. And in this case by the phrase *transfer the property*, we understand not such a title as shall have really transferred the property, but a title which by its nature, would have been sufficient to transfer the property, provided it had been derived from the real owner, such as a sale, exchange, legacy or donation.

Thus prescription could not be acquired under a lease or loan, because these contracts do not transfer the property."

"Art. 3452. It is necessary besides:

1. That the title be valid in point of form; for if the possession commenced by a contract void in that respect, it cannot serve as a foundation for prescription.

2. That the title be certain; thus, every possessor, who cannot fix exactly the commencement of his possession cannot prescribe.

3. That the title be proved, for as it is created by deed it is not presumed, and every man who founds his title on an act must produce it, or prove the contents, if it be lost."

TITLE 23, CHAPTER 3, SECTION 2.

"Art. 3435. The time necessary to prescribe for property, is different, whether the property be immoveable, slaves or moveable.

"Art. 3436. The property of immoveables and slaves is acquired by a longer or shorter time, according as the possessor has been in good or bad faith, as laid down in the following paragraph.

"Art. 3437. Immoveables are prescribed for by ten years between persons present, and twenty years between absentees, when the possessor has been in good faith, and held by a just title during that time.

"Art. 3438. The same species of property is prescribed for by thirty years without any title on the part of the possessor, or whether he be in good faith or not.

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MAINE.

After the 15th of March, 1825, the following Limitations of Actions are prescribed:

Writs of *Right* upon the seisin of ancestor or predecessor of demandant; thirty years.

Writ of entry upon disseisin of ancestor or predecessor, or possessory action upon the possession of ancestor or predecessor; twenty five years.

Any action upon demandant's own seisin; twenty years.

Writs of *Formedon*, in descender, remainder and reverter; twenty years.

son having a right or title of entry, shall be, at the time of the said right

Entry into Lands, must be made within twenty years.

*Proviso.* When any person that is or shall be entitled to any of the Writs of Formedon aforesaid or to make any entry into lands, tenements or hereditaments, shall at the time the said right or title first descended, accrued or fell, be within the age of *Twenty One Years, Feme Covert, non compos*, imprisoned or beyond seas, or without the limits of the United States, that then such person shall and may bring such suit or make such entry, at any time within *Ten Years* after the expiration of the said twenty years aforesaid, and not afterwards.

There is also a provision, that if the proprietor or owner make entry into lands, &c. "which the tenant or those under whom he claims, have had in actual possession for the term of *Six Years* or more before such entry, and withhold from such tenant the possession thereof, such tenant may in an action for money laid out and expended recover from the proprietor or owner the *increased Value* of the premises, by virtue of the buildings and improvements made by such tenant or those under whom he claims. Provided such entry by the owner shall have been made while the tenant was in the actual possession of the premises and against his consent."

In real actions, where the tenant has held as a disseisor for more than six years before the commencement of the suit, the value of the premises may be ascertained by the jury, and also the value of the demanded premises without the improvements; and if during the term in which such verdict shall have been given, the demandant shall make his election on record, in open Court, to abandon the demanded premises to the tenant at the price estimated by the Jury exclusive of the improvements, then no judgment for possession shall be rendered on the verdict, but judgment for the sum so estimated.

#### MARYLAND.

The Statute of Limitations of 21 Jac. 1. c. 16, has been adopted as Law in Maryland; but the Statute of 32 Henry 8, Ch. 2, has not.

By an Act passed February, 1819, the exceptions in favour of "Persons beyond seas," is *repealed* in every case.

#### MASSACHUSETTS.

(*Act of March 2d, 1808.*)

Limitations of real Actions; *Writ of Right*, upon the possession or seisin of the demandant's ancestor or predecessor; forty years.

Writ of Entry upon disseisin of Demandant's ancestor or predecessor; or any action possessory upon possession of demandant's ancestor or predecessor; thirty years.

Any action upon demandant's own seisin or possession; thirty years. (*Act of July 4 1786.*)

Writs of *Formedon*, in descender, remainder, or reverter; twenty years:—And the same limitation of Entry into lands.

"*Provided always*, That when any person that is or shall be entitled "to any of the writs of *Formedon* aforesaid; or to any entry into lands, "tenements or hereditaments, shall at the time the said right or title first "descended, accrued or fell, be within the age of twenty-one years, *Feme*

or title first descended, accrued, come, or fallen, within the age of twen-

"*Covert, Non Compos, imprisoned, or beyond seas, or without the limits of the United States, that then such person shall and may bring such suit, or make such entry at any time within ten years after the expiration of the twenty years aforesaid, and not afterwards.*"

Where an action is commenced for the recovery of land which the tenant in possession or those "under whom he claims" has had in actual possession for the term of six years or more before the commencement of such action, the jury which tries the same if they find a verdict for the demandant, shall (if the tenant requests the same) also enquire, and by their verdict ascertain the increased value of the premises, at the time of trial by virtue of the buildings and improvements made by such tenant, or those under whom he may claim; and (if the demandant shall require it) what would have been the value of the demanded premises, had no buildings or improvements been made by such tenant, or those under whom he may claim;" and the demandant may then, "during the term in which such verdict may be given" "make his election on record in open Court to abandon the demanded premises to the tenant at the price estimated by the jury as aforesaid;" but if the demandant shall not make such election no writ of seisin or possession shall issue in his favour, unless he shall within one year have paid into the clerk's office or otherwise as the Court may appoint, "such sum with the interest thereof as the jury shall have assessed for buildings or improvements as aforesaid." (*Acts of March 2, 1808; March 2, 1810; & February 22, 1820.*)

#### MISSISSIPPI.

Every action, of whatever kind, for the recovery of lands, tenements and hereditaments, must be brought within thirty years after the title accrues.

*Proviso; Saving the rights of Infants, Insane Persons, and Femmes Covert.*

#### MISSOURI.

Limitation of actions for real property.

All actions of whatever kind or description, for any lands, tenements or hereditaments, are limited to *twenty Years*; and every entry into lands must be made within twenty years after the title to the same first descended or accrued. (*Act of 21 February, 1825, Sect. 2.*)

Persons "within the age of twenty-one years, *Femme Covert, Non Compos Mentis, imprisoned, beyond seas or without the limits and jurisdiction of the United States of America,*" may bring action or make entry within twenty years after their disabilities removed; "and in case such person or persons shall die within the said term of twenty years, or under any of the disabilities aforesaid, the heir or heirs of such person or persons shall have the same benefit that such persons would or might have had by living until their disabilities should have ceased or been removed." (*Ibid. Sect. 3.*)

Claims against the state for escheated lands, must be made within *five Years*; "saving, however, to infants, married women, and persons of unsound mind, or persons beyond the limits of the United States, the right

ty-one years, *Feme Covert*, *Non Compos Mentis*, imprisoned, or beyond

"to appear and file their petitions as aforesaid, at any time within five years after their respective disabilities are removed." (*Act of December 18, 1824, Sect. 9.*)

#### NEW-HAMPSHIRE.

Limitation of actions for real property.

No person can maintain any action for the recovery of Lands, unless upon a seisin within twenty years.

There is a saving of five years after disability removed, to such as were, at the time the right or title descended or accrued to them, either *under Twenty-One Years of Age, Feme Covert, Non Compos Mentis, Imprisoned, or without the Limits of the United States.*

#### NEW-JERSEY.

(*Act for the Limitation of Actions, passed 7th, February 1799.*)

Sect. " 10. *And be it enacted*, That from and after the first day of January, which will be in the year of our Lord one thousand eight hundred and three, every real, possessory, ancestral, mixed, or other action, for any lands, tenements or hereditaments, shall be brought or instituted within twenty years next after the right or title thereto, or cause of such action shall accrue, and not after: *Provided always*, That the time, during which the person hath or shall have such right or title, or cause of action, shall have been under the age of twenty-one years, *Feme Covert*, or *Insane*, shall not be taken or computed as part of the said limited period of twenty years."

Sect. 9. Limits the time of entry into lands, &c. to twenty years; but with the same *Proviso*, as is contained in Section 10.

Sect. 11. "*And be it enacted*, That if a mortgagee and those under him, be in possession of the lands, tenements and hereditaments contained in the mortgage or any part thereof, for twenty years after default of payment by the mortgagor, then the right or equity of redemption therein shall be for ever barred."

Sect. 13. Limits suits by the State, for land, to *Twenty Years*.

#### NEW-YORK.

The existing Law of Limitations of *New-York*, relative to *Real Estate*, will be found in Part 3, Chap. 4, Tit. 2, Art. 1; in §§ 32 & 45, of Art. 4; and in Part 2, Chap. 1, Tit. 3, § 18, of the "*Revised Statutes*." (*Vol. 2, pp, 292, 298, 300; Vol. 1, p. 742.*)

" § 1. The people of this state will not sue or implead any person for, or in respect to, any lands, tenements or hereditaments, or for the issues or profits thereof, by reason of any right or title of the said people to the same, unless,

" 1. Such right or title shall have accrued within twenty years before any suit, or other proceeding, for the same shall be commenced: or unless,

" 2. The said people, or those from whom they claim, shall have received the rents and profits of such real estate, or of some part thereof, within the said space of twenty years.

" § 2. The last preceding section shall not extend to any suit or prosecution for, or in respect to, any liberties or franchises.

seas, then such person, and his heir, may, notwithstanding the said

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“ § 3. No action shall be brought for, or in respect to, any lands, tenements or hereditaments, by any person claiming by virtue of any letters patent, or grants from the people of this state, unless the same might have been commenced by the people of this state, as herein specified, in case such patent or grant had not been issued or made.

“ § 4. When letters patent, or grants, of any lands or tenements, shall have been issued or made by the people of this state, and the same shall be declared void by the judgment or decree of some competent court, rendered upon a suggestion of concealment, or wrongful detaining, or defective title, in such case, an action for the recovery of the premises so conveyed, may be brought, either by the people of this state, or by any subsequent patentee or grantee of the same premises, his heirs or assigns, within twenty years after such judgment or decree was rendered; but not after that period.

“ § 5. No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of such action.

“ § 6. No avowry or cognizance of title to real estate, or to any rents or services, shall be valid, unless it appear that the person making the avowry, or the person in whose right the cognizance is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question, within twenty years before the committing of the act, in defence of which such avowry or cognizance is made.

“ § 7. No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry and within twenty years from the time when the right to make such entry, descended or accrued.

“ § 8. In every action for the recovery of real estate, or the possession thereof, the person establishing a legal title to the premises, shall be presumed to have been possessed thereof, within the time required by law; and the occupation of such premises by any other person, shall be deemed to have been under, and in subordination to, the legal title, unless it appear that such premises have been held and possessed adversely to such legal title, for twenty years before the commencement of such action.

“ § 9. Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of some competent court; and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises, under such claim, for twenty years, the premises so included, shall be deemed to have been held adversely; except that where the premises so included, consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

“ § 10. For the purpose of constituting an adverse possession, by any person claiming a title founded upon some written instrument, or some judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

twenty years be expired, bring his action, or make his entry, as he

" 1. Where it has been usually cultivated or improved :

" 2. Where it has been protected by a substantial enclosure :

" 3. Where, although not enclosed, it has been used for the supply of fuel, or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant :

" 4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time, as the part improved and cultivated.

" § 11. Where it shall appear that there has been an actual continued occupation of any premises, under a claim of title, exclusive of any other right, but not founded upon any written instrument, or any judgment or decree, the premises so actually occupied, and no other, shall be deemed to be held adversely.

" § 12. For the purpose of constituting an adverse possession, by a person claiming title not founded upon some written instrument, or some judgment or decree, land shall be deemed to have been possessed and occupied, in the following cases only :

" 1. Where it has been protected by a substantial enclosure :

" 2. Where it has been usually cultivated or improved.

" § 13. Whenever the relation of landlord and tenant, shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy ; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent ; notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumption shall not be made after the periods herein limited.

" § 14. All writs of *sciens facias* upon fines, heretofore levied of any manors, lands, tenements or hereditaments, shall be sued out within twenty years next after the title and cause of action first descended or fallen ; and not after that period.

" § 15. The right of any person, to the possession of any real estate, shall not be impaired or affected, by a descent being cast in consequence of the death of any person in possession of such estate.

" § 16. If any person entitled to commence any action in this Article specified, or to make any entry, avowry or cognizance, be at the time such title shall first descend or accrue, either,

" 1. Within the age of twenty-one years : or,

" 2. Insane : or,

" 3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any term less than for life : or,

" 4. A married woman :

The time during which such disability shall continue, shall not be deemed any portion of the time in this Article limited for the commencement of such suit, or the making such entry, avowry or cognizance : but such person may bring such action, or make such entry, avowry or cognizance, after the said time so limited, and within ten years after such disability removed, but not after that period.

" § 17. If the person entitled to commence such action, or to make such entry, avowry or cognizance, shall die during the continuance of any disa-

might have done before this act, so as such person, or his heir, shall,

bility specified in the preceding section, and no determination or judgment be had of the title, right or action to him accrued. his heirs may commence such action, or make such entry, avowry or cognizance, after the time in this Article limited for that purpose, and within ten years after his death ; but not after that period."

" § 32. Whenever any person shall be disabled to prosecute in the courts of this state, by reason of his being an alien subject or citizen, of any country at war with the United States, the time of the continuance of such war, shall not be deemed any part of the respective periods limited in the first and second Articles of this Title, for the making of any entry, or the commencement of any action."

" § 45. The provisions of the preceding Articles of this Title, shall not apply to any actions commenced, nor to any cases where the right of action shall have accrued, or the right of entry shall exist, before the time when this Chapter takes effect as a law ; but the same shall remain subject to the laws now in force."

#### PART II, CHAP. I, TITLE 3.

" § 18. A widow shall demand her dower within twenty years after the death of her husband ; but if, at the time of such death, she be under the age of twenty-one years, or insane, or imprisoned on a criminal charge or conviction, the time during which such disability continues, shall not form any part of the said term of twenty years." (*Vol. 1, p. 742.*)

The "*Act for the Limitation of Criminal Prosecutions and Actions at Law*," (24th Sess. Chap. 183 ; 1 R. L. 184. 185, 186,) was the " Law in force," when the "*Revised Statutes*," went into operation : It contains the following sections.

" III. *And be it further enacted*, That all writs of *scire facias* upon fines of any manors, lands, tenements or hereditaments hereafter to be brought, shall be sued and taken within twenty years next after the title " and cause of action first descended or fallen and not after ; and no person shall at any time hereafter make any entry into any manors, lands, tenements or hereditaments but within twenty years next after his right " or title descended or accrued to the same, and in default thereof such person so not entering and his heirs shall thereafter be barred from making such entry : *And further*, That no claim or entry of or upon any manors, lands, tenements or hereditaments shall be a sufficient entry or claim within the meaning of this act, unless an action shall be commenced thereupon within one year next after the making of such entry or claim, and prosecuted with effect : *Provided*, That if any person entitled to any such writ of *scire facias*, or to make such entry, be at the time such right or title first descended or accrued within the age of twenty-one years, *Feme Covert*, insane or imprisoned, such person and his heirs, shall or may after the said twenty years be expired, bring such action or make such entry as he or they might have done before the expiration of the said twenty years, so as such person within ten years after such disability removed, or the heir or heirs of such person within ten years after his death, sue forth such writ or make such entry, and at no time after ten years as aforesaid.

" IV. *And be it further enacted*, That any disseisor dying seised of any lands, tenements or hereditaments, having no right or title therein, shall not be taken or deemed any such descent in the law as to toll or take



within ten years next after his and their full age, discoverture, coming

“away the entry of any person or his heirs, who at the time of such descent shall have lawful right of entry therein, unless such disseisor shall have had the peaceable possession of the lands, tenements or hereditaments whereof he shall so die seised for the space of five years next after the disseisin by him committed, without entry or continual claim by or of the person or persons having lawful title thereto.”

### NORTH CAROLINA.

(Act of 1715.)

Entry or claim into lands, tenements and hereditaments, by persons that shall have right or title thereto, limited to seven years.

*Proviso*; Saving the rights of such persons as at the time the right or title first descended or accrued to them, were within the age of twenty-one years, *Feme Covert, Non Compos Mentis*, imprisoned or beyond seas, “so as such persons shall, within three years next after full age, discoverture, coming of sound mind, enlargement out of prison, or persons beyond seas, within eight years after the title or claim becomes due; take benefit and sue for the same, and at no time after the times of limitations herein specified; but that all possessions held without suing such claim as aforesaid, shall be a perpetual bar against all and all manner of persons whatsoever, that the expectations of heirs may not, in a short time, leave much land unpossessed; and titles so perplexed, that no man will know of whom to take or buy land.”

Where persons in possession of lands, &c. or those under whom they claim have been in possession twenty-one years, under titles derived from sales made either by creditors, executors or administrators of any person deceased, or by husbands and their wives, or by indorsements of patents or other colourable title, such possessions are “ratified, confirmed and declared to be a good and legal bar against the entry of any person or persons, under the right or claim of the state, to all intents and purposes whatsoever; any former act, law or usage to the contrary notwithstanding: *Provided nevertheless*, that the possession so set up shall have been ascertained and identified under known and visible lines or boundaries.” (Act of 1791. Chap. 15.)

### OHIO.

“Act for the limitation of actions.” (Passed 4th January, 1804.)

“No person or persons shall hereafter sue, have or maintain any writ of ejectment, or other action for the recovery of any possession, title or claim of, to or for any lands, tenements or other hereditaments, but within twenty years next after the right of such actions or suits shall have accrued.” (Ch. 3: Sect. 2.)

“Sect 3. *Provided always, and be it further enacted*, That if any person or persons [who] is or shall be entitled to have, sue or bring any such action or actions as aforesaid, shall be within the age of twenty-one years, insane, *feme covert*, imprisoned or beyond sea, at the time when any such action or actions, may, or shall have accrued, then every such

of sound mind, enlargement out of prison, or coming into this realm, or

"person or persons shall have a right to have, sue or bring any of the action or actions aforesaid within the times hereby before limited in this act, after such disability shall have been removed."

### PENNSYLVANIA.

(Act of 26th March, 1785, Chap. 1134. Sec. 2.—3 Rev. Laws p. 40.)

Entry into lands, &c. ; writs of right or any other real or possessory writ or action for lands, &c. limited to twenty-one years.

*Proviso* ; Saving the rights of persons "within the age of twenty-one years, *Feme Covert*, *Non Compos Mentis*, imprisoned, or beyond the seas, or from and without the United States of America," so as such persons or the heirs of such persons, shall within ten years next after disability removed, "take benefit of or sue for the same." And in case of the death of such persons under any of the disabilities aforesaid, their heirs "shall have the same benefit, that such persons might have had by living until such disabilities had ceased or were removed;" and if any abatement happen in any proceedings upon such right or title, they may be renewed and continued, "within three years from the time of such abatement but not afterwards." (*Ibid.* Sect. 4.)

By the Act of 11th March, 1800, Chap. 2118, the above act is "declared to have no force or effect within what is called the seventeen townships, in the county of Luzerne, nor in any case where title is, or has at any time, been claimed under what is called the Susquehanna Company, or in any way under the state of Connecticut, for any lands or possessions within this Commonwealth."

### RHODE ISLAND.

The Statutes of 32 Henry, 8. Ch. 2. and of 21 James 1. Ch. 16., are in force in the State of Rhode Island. (*Vide Inman vs. Barnes*, 2 Gallison's Rep. 316. 317.)

The act entitled "an Act for quieting possessions and avoiding suits at law," declares, "That where any person or persons, or others, from whom he or they derive their titles, either by themselves, tenants, or leases, shall have been, for the space of twenty years, in the uninterrupted, quiet, peaceable, and actual, seisin and possession, of any lands, tenements, or hereditaments within this State, for and during the said time, claiming the same as his, her, or their proper, sole and rightful estate in fee simple, such actual seisin and possession shall be allowed to give and make a good and rightful title to such person or persons, their heirs or assigns forever. And this act being pleaded in bar, to any action that shall hereafter be brought for such lands, tenements and hereditaments, and such actual seisin and possession being duly proved, shall be allowed to be good, valid and effectual in the law for barring the same." To this act there is the following Proviso:

"*Provided further*, That nothing above contained shall extend or be construed, or deemed to extend, to bar any person or persons having any estate in reversion or remainder expectant or depending in any lands, tenements or hereditaments, after the end or determination of the estate for years, life, or lives, such person or persons pursuing his or their title, by

death, take benefit of, and sue forth the same, and at no period after the said ten years."

"due course of law, within ten years after his or their right of action shall accrue, any thing in this act, to the contrary notwithstanding." (*Ibid.*)

#### SOUTH CAROLINA.

(Public Laws, page 101. Act of December 12, 1712.)

"If any person or persons to whom any right or title to lands, tenements or hereditaments, within this province shall hereafter descend or come, do not prosecute the same within 5 years after such right or title accrued, that then he or they, and all claiming under him and them, shall be forever barred to recover the same, excepting any person or persons beyond the seas, or out the limits of this province, feme covert or imprisoned, who shall be allowed the space of 7 years to prosecute their right or title, or claim to any lands, tenements or hereditaments, in this province, after such right and title accrued to them or any of them, and at no time after the said seven years; and also excepted, any person or persons that are under the age of 21 years, who shall be allowed to prosecute their claims of any time within 2 years after they come to age, and if beyond the seas, 3 years." (*Ibid. Sect. 2.*)

"Persons under 21 years shall be allowed 5 years after attaining the said age to prosecute their right or title to lands, and 4 years after attaining such age to prosecute any personal action to which they are or may be entitled; any thing in the said Act, passed 12th of December, to the contrary hereof in any wise notwithstanding." (*Act of 29th February, 1788, Sect. 2. Public Laws, p. 455.*)

Claim to lands to be effectual, must be made by "action of law duly entered in the Court of Common Pleas within this province, according to the former practices and rules of the said Court." (*Act of December 12th, 1712, Sect. 3.*)

Not only the persons which have not made their claim to any lands, &c. within the time limited by this act shall be barred, but also all manner of persons whatsoever, that shall at any time claim under such person or persons who have lost their claim, shall be in like manner barred by this Act. (*Ibid. Sect. 5.*)

"And whereas by this Act a person being a *Feme Covert*, is limited as to the time of laying claim to lands or tenements, and to commencing actions or suits of law, and not excepted generally until discovery and that such person may be no way prejudiced by the same, *Be it further enacted*, That in case any feme covert have any right or claim to any lands or tenements within this province, or any other action or suit whatsoever, such feme covert shall have power to constitute an attorney, under her hand and seal, to prosecute such her claim, action or suit, either in her own name or the name of her husband and self, as if her husband had joined with her in such power of attorney, and such person so constituted shall have power to prosecute such suit or claim to effect, and her husband shall not have power to abate discontinuance or release her claim or action, without her voluntary consent given in open court, and recorded in the proceedings, neither shall such suit or action be any way abated upon the account of such woman being under coverture, but the pro-

From the ancient doctrine of *nullum tempus occurrit regi*, [2] the King

"ceedings shall be in all things as good and effectual in law, as if such woman was sole or her husband joined with her in such suit, any law, statute, act, usage or custom in this Province, to the contrary notwithstanding."—(*Ibid*, Sect. 16.)

### TENNESSEE.

(Act of 16 November, 1819. Ch. 28.)

Seven years possession of lands, &c. which have been granted by this State, or the State of North Carolina, where the same have been held or claimed by virtue of a deed or deeds of conveyance, devise, grant, or other assurance purporting to convey an estate in fee simple, and no claim by suit in law or equity effectually prosecuted against such possession within that time, entitles the possessor to keep and hold in possession such quantity of land as shall be specified and described in his, her or their deed of conveyance, devise, grant or other assurance, as aforesaid in preference to, and against all, and all manner of person or persons whatsoever; and "shall have a good and indefeasible title in fee simple to such lands, tenements, or hereditaments: any law, usage or custom to the contrary notwithstanding." And all persons having a legal or equitable title which

[2] The maxim *nullum tempus occurrit regi* applies to the State; and no title to Lands can be acquired against the State, by the Statute of Limitations. The Statute of Limitations cannot bar an escheat, or give a right to escheated property.—*Harlock & Al. vs. Jackson*, 1 *Constit. Rep.* 135.

The Statute of Limitations does not run against the Commonwealth.—*Commonwealth vs. McGowan*, 4 *Bibb's Rep.* 62.—& *Vide Kemp vs. Commonwealth*, 1 *Hen. & Munf. Rep.* 85.—*Nimmo's Exors. vs. Commonwealth*, 4 *Ibid.* 57.

The Commonwealth cannot be disseised; neither does the Statute of Limitations run against the Commonwealth.—*Chiles vs. Calk*, 4 *Bibb's Rep.* 554.

"No laches can be imputed to the Government and against it no time runs so as to bar its rights."—*Stoughton & Al. vs. Baker & Al.*, 4 *Mass. Rep.* 528. (Per PARSONS, Ch. J. delivering the Opinion of the Court.)

"The Commonwealth cannot be affected by the Act of Limitations," *Johnston vs. Irwin*, 3 *Serg. & R. Rep.* 292. (Per TILGHMAN, Ch. J. delivering the Opinion of the Court.)

Possession cannot be pleaded against the Public, unless it is immemorial. *Allard & Al. vs. Lobau*, 3 *Martin's Rep.* (N. S.) 294.

Statutes of Limitations do not run against the United States.—*United States vs. Hoar*, 2 *Mason's Rep.* 312.

A constructive possession of lands under colour of title, for twenty-one years, under known and visible boundaries or lines, will not bar the right of entry under the State. Nor will the actual possession for twenty-one years of different parts of the lands covered by colour of title, by purchasers from him to whom the colour of title was made, avail him as to the parts of the land not sold and actually possessed. For they are distinct

[ \*47 ] is not bound by this statute, (j) nor are ecclesiastical persons within it, because it would be an indirect means of evading the statutes made to prohibit their alienations ; but, with these

(j) By stat. 9. Geo. III. c. 16. the King is disabled from claiming title, (except to liberties and franchises,) unless the same shall accrue within the space of sixty years next

before suit or claim, and consequently an adverse possession of lands for sixty years will now be a good title, even against the Crown. ,

they neglect for seven years to prosecute effectually against such possessor, shall be for ever barred. (Section 1.)

*Proviso* : Saving the rights of persons who shall be at the time the said right or title first descended, accrued, come or fallen, within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond the limits of the United States and the territories thereof, so as they bring their action within three years next after such disability removed. " *Provided also*, That in the construction of this saving no cumulative disability shall prevent the bar aforesaid ; but shall only apply to that or those disabilities, which existed, when the right to sue first accrued and no other ; and provided also, that such suit so commenced to save the bar, shall be a suit prosecuted with effect and no other."

All suits or actions either in law or equity for any lands, &c. limited to seven years. (Section 2.)

*Provisoes*, the same as to the first section.

tracts, held by different persons in different rights.—*Doe ex-dem. Clinton & Al vs. Herring*, 1 *Murph. Rep.* 414.

A grant of land by the Commonwealth will pass its title, notwithstanding an adverse possession, the Commonwealth being incapable of being disseised.—*Ward vs. Bartholomew*, 6 *Picker. Rep.* 409,

In the case of *Hall vs. Gitting's Lessee* (2 *Harr. & Johns. Rep.* 112. 114.) CHASE, Ch. J. (with whom the other Judges, DUVAL & DONE concurred) said ; "The court are of opinion, that there is no adversary possession on the part of the defendant which can defeat the right derived from the state. Under the act of October, 1780, ch. 49, the state became actually possessed of the land ; and that act dispenses with the requisites necessary in the case of the crown to avoid a possession adversary to the right of the crown, to wit, an office found, or an actual entry. By an office found in *England*, the crown becomes actually seized and possessed of any escheat land in question. The state then had the right to pass the act of assembly ; and by that act, the state by its commissioners, was in as full possession of the land as if there had been an office found, or actual entry by the commissioners, and ouster of the defendant, or those under whom he claims."

Previous to the first of January 1830, by the 1st section of the Act of the Legislature of the State of New-York, entitled " *An Act for the Limitation of Criminal Prosecutions and of Actions at Law* ;" passed 8th April, 1801. (1 *R. L.* 184.) All suits by the State, "for or in respect to any lands, tenements or hereditaments, other than liberties or franchises, or the issues or profits thereof," were limited to forty years.

But now by the " *Revised Statutes*," Part 3, Chap. 4, Tit. 2. Art. 1, § 1, the Limitation is reduced to twenty years. And § 2, contains an exception as to any Liberties or Franchises." (Vol. 2. pp. 292, 293.)

exceptions, the statute applies to all persons, capable of a right to enter; and, therefore, if it appear that there has been a possession by the

### VERMONT.

(*Act of 6 November 1797, Ch. 110. 2 Digested Laws page 405.*)

Writ of right or other real action; action of ejectment, or other possessory action, of whatever name or nature limited to fifteen years. (*Section 6.*)

Entry into lands, &c. limited to fifteen years. (*Ibid.*)

"This act shall not extend to bar any infant, *Feme Covert*, person imprisoned, or beyond Seas, without any of the United States, or *Non Compos Mentis*, from bringing either of the actions before mentioned, within the term before set and limited for bringing such actions, calculating from the time such impediment shall be removed. And if any person, against whom there is, or hereafter may be any cause or suit, for any or every the species of personal actions before enumerated, who at the time the same accrued, was without the State, and shall not have property therein which could by the common and ordinary process of law, be attached; that then and in every such case, the person who was entitled to bring such action or suit, shall have liberty to commence the same, within the respective periods before limited after such absent person's coming or return into this State." (*Section 10.*)

"Nothing contained in any Statute of Limitation, heretofore passed, shall be construed to extend to any lands, granted, given, sequestered or appropriated to any public pious or charitable use; or to any lands belonging to this State. And any proper action of ejectment or other possessory action may be commenced, prosecuted or defended, for the recovery of any such land or lands: any thing in any Act or Statute of Limitations, heretofore passed to the contrary, notwithstanding." (*"Act relating to public Lands." Passed 11th November, 1802. 2 Digested Laws, 411. & Vide Act of 26th October, 1801. 2 Ibid. 410.*)

These two last mentioned acts, however, were, by the act of 6th November, 1819, Chap. 15, *repealed*, "so far as they relate to the rights of land in this State, granted to the Society for the Propagation of the Gospel in foreign parts."

### VIRGINIA.

Writs of right upon the seisin or possession of the demandant's ancestor or predecessor, limited to fifty years.

Other possessory actions, upon the like seisin or possession, limited to forty years.

Real actions upon demandant's own seisin or possession limited to thirty years.

Writs of Formedon in descender, remainder or reverter of any lands, tenements or hereditaments, limited to *Twenty Years* next after the title or cause of action accrued. And entry into lands, &c. limited to the same time.

*Proviso*; Saving the rights of any persons, under the age of one and twenty years, *Feme Covert*, *Non Compos Mentis*, imprisoned, or not within this Commonwealth at the time such right or title accrued, who and his heirs, may, notwithstanding the said twenty years are expired bring and maintain his action, or make his entry, within ten years next after such disabilities removed, or the death of the person so disabled, and not afterwards.

defendant, or those under whom he holds, for the last twenty years, adverse to the title of the claimant,[1] and that the claimant has not been prevented from prosecuting his claim earlier, by reason of some of the disabilities allowed by the statute, he will be barred of his remedy by ejectment.

It is not easy to define what will constitute an adverse holding of this nature, but it may be safely laid down \*that an adverse possession will be negatived, when the parties claim under the same title, when the possession of one \*party is consistent with the title of the other, when the party claiming title has never in contemplation of law been out of possession, and when the possessor has acknowledged a title in the claimant.

[\*50] \*First, where the parties claim under the same title.[1]

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[1] A Defendant in Ejectment, being in possession of the land for which the suit is brought, holding the same by a claim of title adverse to that of the Plaintiff for 20 years, is not necessarily entitled to a verdict: as where he holds as *Devisee*, under a devise by a *Husband* of land which belongs not to himself, but to his Wife. For, the Will of a *Husband* does not pass his Wife's land, and no possession of the same, by a *Devisee*, under the Will, can create a presumption of title. *Bowie vs. O'Neale & Al. Lessee*, 5 *Harr. & Johns. Rep.* 226.

*Et Vide*, Note (A.,) in the *Appendix*, where all the decisions on the subject are collected and arranged.

[1] "For in general where "two persons claim by the same title, there shall "be no adverse possession so as to toll an entry of the one, but the entry "of the other be at all times lawful." 2 *Esp. Ni. Pri.* 8. (*old paging* 434.) *Carothers & Al. vs. The Lessee of Dunning & Al.* 3 *Serg. & R's Rep.* 386.

Purchasers under the same title, without partition, cannot prescribe against each other, by the lapse of ten years. *Broussard vs. Duhamel, & Martin's Rep. N. S.* 11.

"To constitute an adverse possession there must be a possession under "colour and claim of title; but *Beekman's* entry, claiming as tenant in common under the same title as that of the Lessors of the plaintiff, qualified "his entry and admitted the title of the Lessors; so that neither *Beekman* "nor the defendants, [*they claimed Title under Beekman*] could set up "that entry as adverse to the common title, or as injurious to the rights of "the other tenants in common." *Smith ex dem. Teller & Others vs. Burtis & Woodward*, 9 *Johns. Rep.* 179, 180. And to the same purport, *Vide Jackson ex dem. Fisher vs. Creal & Kellogg*, 13 *Johns. Rep.* 116. *Jackson ex dem. Sinsabaugh & Others vs. Sears*, 10 *Johns. Rep.* 435. *Jackson ex dem. Stevens vs. Stevens*, 16 *Johns. Rep.* 116. *Jackson ex dem. Corson & Sebring vs. Cairns & Coles*, 20 *Johns. Rep.* 301.

In *Jackson ex dem. Hill vs. Streeter*, (5 *Cow. Rep.* 530, 531.) SUTHERLAND, J. delivering the Opinion of the Court, said; "I do not understand

As if a man seised of certain land in fee have issue two sons, and die seised, and the younger son enter by abatement into the land, the

“the Judge as having excluded the patent to *Miles*; but only as deciding “that the patent itself without other evidence, would not shew a subsisting title out of the Lessor of the Plaintiff. In this, I apprehend, he was “correct. The Plaintiff had shown a deed for the premises in question “from *Buck* to *John Streeter*, in *September*, 1798: that *Streeter* went into “possession under the deed, and continued in possession until his death, “19 or 20 years before the trial, leaving four children; (the interest of “two of them being owned by the Lessor;) and that the Defendant *Benjamin*, one of the children, has been in possession ever since. This was “a good adverse possession against the patent granted in 1790.

“The evidence that *Buck*, who gave the deed to *John Streeter*, had no “title, was properly rejected on several grounds. *John Streeter* was “the common source of title to both parties. His children, there being no “will, are presumed to have taken the premises by descent, as tenants in “common. It is not for the Defendant to say that the common ancestor “had no title, and that his possession is not as tenant in common, but in “his own individual right.”

In the case of *Den ex dem. Midford & Ux. vs. Hardison*, (3 *Murph. Rep.* 166.) *TAYLOR*, Ch. J. delivering the Opinion of the Court, said; “As an adverse possession alone, will not take away a right of entry, neither will it, when under a title which is common to the plaintiff and defendant; the intendment of Law being in such case, that the defendant’s “entry was for the benefit of all entitled as co-heirs. Where both parties claim by descent from the same common ancestor, a color of title by “virtue of such descent, cannot be set up by one against the other, whatever may be the effect of a descent in any other case, which the Court “does not decide.” & *Vide Witham vs. Perkins*, 2 *Greenl. Rep.* 400.

A person coming into possession under a will cannot obtain a right by possession adversely from others claiming under the same will: possession as to them is fiduciary. *Vaux, Executor, &c. vs. Nesbit & Al. Executors*, &c. 1 *M'Cord's Ch. Rep.* 352, 360.

In *Gay vs. Moffit*, (2 *Bibb's Rep.* 506. & *Seq.*) the Opinion of the Court was delivered by JUDGE LOGAN; who said; This was an action of ejectment, in which the appellant, who was the defendant below, relied on “his adverse possession for twenty years.

“One of the grounds opposed to this possessory right, is an agreement, “by which the defendant, after his entry on the land, had purchased the “same from the plaintiff, agreeing therein to pay rent upon certain contingencies.”

“Where one claims under or through the other, there shall be no adverse possession in such case sufficient to give a title. Nor does it seem “to vary the rule that such claim was acquired posterior to the entry on “the land. For where a cottage built in defiance of a Lord and quiet possession of it for twenty years, was held to be within the Statute; yet it “was ruled that if it had been built at first by the lord’s permission, or any “acknowledgement had since been made, the Statute would not run against “the lord. And although the reason there assigned, is, that the possession of a tenant at will works no *disseisin*; still the principal is the same,



statute will not operate against the elder son; for when the younger son so abates into the land after the death of his father, before any entry made by the elder son, the law intends that he entered, claiming as heir

"to stop the running of the Statute by the acknowledgment or agreement subsequently made; thereby converting an *adverse hostile* possession into a friendly possession, claiming protection under the same right, but the tenure thus conferred seems unimportant with respect to the effect produced on the running of the Statute; for whether it be at will, for a term of years or for a greater estate is deemed totally immaterial. (*See Esp. 435. Bull. N. P. 104.*)

"This doctrine seems also to be supported in the case of *Brandt vs. Ogden*, decided by the Supreme Court in New-York, (1 Johns. Rep. 157.) In that case it is said, that in order to bar the recovery of the plaintiff who has title, by a possession in the defendant, strict proof has always been required, not only that the first possession was taken under claim hostile to the real owner, but that such hostility has existed on the part of the succeeding tenants. The operation of the Statute in such case seems to cease against a claim purchased or brought in aid of the protection of the possession. A claim thus recognised, and brought in to protect the possession, cannot be *adverse* and *hostile* to it. And when in the general, persons claim by the same title, there shall be no adverse possession so as to toll the entry, but the entry of the other be at all times lawful. (*Esp. 434. Co. Litt. 242. 296.*)

"If, therefore, we consider the appellant as having no other title than that derived from possession, and that his possession has been changed from an *adverse hostile*, into a friendly possession, it follows that the Statute of Limitations, does not apply to his case."

But; to change the character of a possession from adverse to amicable, some agreement legally obligatory must be made; acknowledging the title of the plaintiff; a mere verbal agreement to buy in an overhanging title, will not stop the running of the Statute of Limitations. *Daniel vs. Ellis & Al., 1 Marsh. Rep. (Ky.) 60.*

And in case of *Briscoe's heirs, &c vs. McGee & Al., (1 Marsh. Rep. (Ky.) 190.)* OWSLEY, J. delivering the Opinion of the Court, said; "And as the plaintiff, Parmenias Briscoe, is proven to have entered upon and taken possession of the land in contest, in company with and by the direction of his father, Gerard Briscoe; and as the possession appears also to have been taken under the claim of Gerard Briscoe, then actually surveyed, the possession so taken we are of Opinion, should be considered *adverse* to that of the defendant in Error, although Parmenias, by a contract with a certain Inlow, to whom it is shewn the defendant had previously sold his claim to the land, purchased and paid him for the improvements made upon the land."

Where both the plaintiffs and defendants claim under the same right, the plaintiffs are not bound to trace back their title beyond the person holding that right. If there be an adverse right, it lies in the defendant to show it. *Riddle vs. Murphy, 7 Serg. & R. Rep. 230.*

A defendant in Ejectment, who makes title under the same survey as the plaintiff, cannot object that it was made on a shifting location, or say any thing against it. *Powers vs. M'Ferran, 2 Serg. & R. Rep. 44.*

to his father, by which title the elder son also claims.<sup>(k)</sup> So, also, if the defendant should make title under the sister of the lessor of the plaintiff, and prove that she had enjoyed the estate above twenty years, and that he had entered as heir to her, the court would not regard it, because her possession would be construed to be by curtesy, and not to make a disherison, but, by licence, to preserve the possession of the brother, and, therefore, not within the intent of the statute; though, if the brother be once in actual possession, and ousted by his sister, it would, it seems, be otherwise, for then her entry could not possibly be construed to be to preserve his possession.<sup>(l)</sup>

Secondly, where the possession of one party is consistent with the title of the other.<sup>[2]</sup>

(k) Co. Litt. s. 396.

(l) B. N. P. 102. Co. Litt. 242, (b). *Sharrington v Strotton*, Plow. 298, 306.

[2] In the case of *Jackson ex dem. Bowen vs. Burton*, (1 *Wend. Rep.* 343.) The COURT (*Per SUTHERLAND, J.*) said; "The Defendant, on the 24th January, 1801, conveyed the premises in question by a Warrantee Deed, to Benjamin Bowen. By that conveyance, all the right and title which the Defendant then had in the premises, passed to his grantee; and even any title subsequently acquired, would have enured to his benefit. Although the Defendant remained in possession after the conveyance, it was not as owner, but as tenant to his grantee, and nothing but a clear, unequivocal and notorious disclaimer of the title of his Landlord, could render his possession, however long continued, adverse."

Where the defendant's possession was consistent with every existing claim, it was *Held*, that it "could be adverse to none." *Beach vs. Catlin*, 4 *Day's Rep.* 295. And to the like effect, *Vide Barr. vs. Gratz's Heirs*, 4 *Wheat. Rep.* 213. *Fraser & Al. vs. M'Pherson & Al.*, 3 *Eq. Rep. (Des-saus.)* 408. *Witham vs. Perkins*, 2 *Greenl. Rep.* 400.

In the case of *Thayer assignee. &c. vs. Cramer & Al.*, (1 *M'Cord's Ch. Rep.* 395, 397.) The COURT *Per* NORT, J. said; "In this case it is the Opinion of the Court that the decree of the Chancellor ought to be affirmed. Mrs. Gibbes is the only appellant, and the ground on which she relies is, that having been five years in possession she is protected by the Statute of Limitations. A mortgage of land in this state does not convey a fee, even after the time of redemption is past, the legal title still remains in the mortgagor, and the land is only considered as a pledge to receive the payment of the money. The mortgagor must therefore be considered as a trustee for the mortgagee, and cannot be considered as holding adversely. And a purchaser having a knowledge of the trust places himself in the same situation, making himself thereby a trustee. *Murray vs. Ballou*, 1 *Johns. Ch. Rep.* 575. 3 *Vern.* 271. 2 *Fonbl.* 152. The act requiring mortgages to be recorded was for the purpose of giving notice to creditors and subsequent purchasers. And as the mortgage in this case was recorded, we must consider the defendant as a purchaser with notice, and as holding subject to that incumbrance."

Thus, where, by a marriage settlement, a certain copyhold estate of

"The possession of the mortgagor, or those claiming under him, is not adverse to, but is compatible with, the rights of the mortgagee." The Statute of Limitations does not apply to such a case. *Higginson vs. Mein*, 4 Cranch's Rep. 419. & *Vide Jackson ex dem. Dox vs. Jackson*, 5 Cow. Rep. 174.

"No debtor, no mortgagor can set up an adverse possession against his creditor, or the mortgagee." (*Per DESAUSURE, Ch.*) *Fraser & Al. vs. M'Pherson & Al.* 3 Eq. Rep. (*Desaus.*) 408.

The possession of the tenant for life is not adverse to, but consistent with the title of the reversioner in fee. *Banks, Admr. vs. Marksberry*, 3 Littell's Rep. 282.

In the case of *Kirk & Al. vs. Smith ex dem Penn. In Error*, (9 Wheat. Rep. 241, 288.) MARSHALL, Ch. J. delivered the Opinion of the Court; in speaking of "those rules which apply to Acts of Limitation generally," he said; "One of these, which has been recognized in the Courts of England, and in all others where the rules established in those Courts have been adopted, is, that possession to give title must be adversary. The word is not, indeed, to be found in the Statutes; but the plainest dictates of common justice require that it should be implied. It would shock that sense of right which must be felt equally by Legislators and by Judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title. Several cases have been decided in this Court, in which the principle seems to have been considered as generally acknowledged; and in the State of Pennsylvania particularly, it has been expressly recognized. To allow a different construction, would be to make the Statute of Limitations a Statute for the encouragement of fraud—a Statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such construction."

Where two non-residents held in common an unsettled tract of land, which without their knowledge was sold for non-payment of the state taxes; and they afterwards made partition by mutual deeds of release and quitclaim, in common form; after which one of them, within the time of redemption paid the tax to the purchaser at the sheriff's sale, from whom he took a deed of release and quitclaim to himself alone for the whole tract;—it was held that this payment and deed enured to the benefit of them both; that the party paying, had his remedy by action against the other for contribution; and that he who had not paid, might still maintain a writ of entry against the other, for his part of the land. *Williams vs. Gray*, 3 Greenl. Rep. 207.

Where a tenant by the curtesy of an undivided portion of an estate had abandoned the land for more than forty years, leaving it in the possession of another tenant in common, whose occupancy was an ouster; it was held that the reversioner of such undivided portion of the estate had no right of entry upon the tenant in possession, during the life of the tenant by the curtesy, his abandonment of the land being no forfeiture of the estate. *Witham vs. Perkins*, 2 Greenl. Rep. 400.

A. being seised in fee of an undivided moiety of an estate, devised the same (by will made some years before her death) to her nephew and two nieces, as tenants in common; one of the nieces died in the life time of A.

the wife was limited to the use of the survivor in fee, but no surrender was made to the use of the settlement, and after the death of the wife, the husband was admitted to the lands, pursuant to the *equitable* title, acquired by the settlement, it was held that if he had had no other title than the admission, a possession by him for twenty \*years [ \*51 ] would have barred the heir-at-law of the wife; but as it appeared that there was a custom in the manor for the husband to hold the lands for his life, in the nature of a tenant by the courtesy, *and this without any admittance after the death of the wife*, the possession of the copyhold by the husband was referred to this title, and not to the admission under the settlement; and such possession being consistent with the title of the heir at law, he was allowed to maintain ejectment against the devisee of the husband, within twenty years after the husband's death, though more than twenty years after the death of the wife.(m)[1]

(m) *Doe, d. Milner, v. Brightwen*, 10 East, 588.

and left an infant daughter. A. by another will intended to have devised the moiety to the nephew and surviving niece, and the infant daughter of the deceased niece, but this will was never executed. After A's death, the nephew and surviving niece covenanted to carry the executed will into execution, and to convey one-third of the moiety to a trustee, upon trust to convey the same to the infant if she attained twenty-one, or to her issue if she died under twenty-one, and left issue; or otherwise to the nephew and niece in equal moieties. No conveyance was executed in pursuance of the deed. The rents of the third were received by the trustee for the use of the infant during her life-time. An Ejectment having been brought by the devisee of the nephew, more than twenty years after his death, but less than twenty years after the death of the infant; it was *Held*, that there was no adverse possession until the death of the infant, and that the Ejectment was well brought. *Doe dem. Colclough & Uz. vs. Hulse*, 3 *Barnew. & Cress. Rep.* 757.

A conveyance in fee having been shewn from the original proprietor of a tract of Land, the grantees will be presumed to have entered into possession; and whoever is in possession will be presumed to hold for them, and in subordination to their title, until the contrary appears. So ruled in a case where the Claim to recover was made under a conveyance executed fifty-five years before suit brought. *Doe ex dem. Marston & Al. vs. Butler*, 3 *Wend. Rep.* 149.

[1] Where a person entered into the possession of Land belonging to his father-in-law, who promised to give the lot to him and his wife; but subsequently, by will, devised the same to the wife; it was *Held*, in an Action of Ejectment brought by the heirs of the Wife against the Grantee of the Husband (he having been in possession 36 years, claiming the lot as his own under a conveyance from the Husband,) that his possession was not adverse, and that a conveyance to the Husband from his Father-in-law

And although one third part of the premises had been settled many

could not be presumed.—*Jackson ex dem. Haverly & Ux. vs. French*, 3 *Wend. Rep.* 337.

Where a Grantee under a conveyance from a Tenant by the curtesy of a house and lot, goes into possession of the lot and of an Alley adjoining the same, which had been used for thirty years by the owners of the lot as appurtenant thereto; continues in possession himself nine years, and then acquires title to the Alley from a third person, he cannot set up such title as adverse in an Action of Ejectment brought by the heir to recover the premises as the inheritance of his mother, the action having been brought within twenty years after the termination of the life estate.—*Jackson ex dem. McCrea vs. Mancius & Al.* 2 *Wend. Rep.* 357.

Where A. entered into possession of land in 1770, and in 1786 received a deed from his father and mother for the Land, but which was not acknowledged by the mother, to whom the title belonged by inheritance; it was *Held*, that the acceptance of the deed was sufficient to repel the parol evidence that A. entered adversely to his mother's title; or if his possession had been adverse to that time, it ceased to be so, on accepting the deed; and he was deemed to hold under the deed such interest as his father held, that is an estate for life; and that on the death of the father the estate reverted to the mother or her heirs.—*Jackson ex dem. Sinsabaugh & Al. vs. Sears*, 10 *Johns. Rep.* 435, 441. *Cited and confirmed*, in *Jackson ex dem. Stevens vs. Stevens*, 16 *Johns. Rep.* 116; and *Jackson ex dem. Corson & Sebring vs. Cairns & Coles*, 20 *Johns. Rep.* 301.

In *Jackson ex dem. Stevens vs. Stevens*, (16 *Johns. Rep.* 116.) SPENCER, J. who delivered the Opinion of the Court, said; "It was objected that the deed from Briggs and wife to Ebenezer Stevens was void, on the ground that Samuel Stevens held adversely. It will be observed, that he was dead when this deed was given, and that Ebenezer Stevens had succeeded as tenant in common with his widow, under the will to an undivided portion of the estate; and it may well be doubted, whether a deed which he took when actually entitled to a part of the estate can be said to be adverse. But there is another decisive answer: Samuel Stevens, accepted a deed from Briggs and his wife, and he held under it such a right as the deed conveyed. That right was only the interest which Briggs had in the premises, as his wife never acknowledged the deed, until several years after the death of Samuel Stevens; Briggs' interest was an estate for life, *jure uxoris*. The possession of Samuel Stevens was not then adverse to the right of Briggs' wife. (10 *Johns. Rep.* 441.)"

In the case of *Jackson ex dem. Corson & Al. vs. Cairns & Al.* (20 *Johns. Rep.* 301.) Ryers had remained in possession of his Wife's Land, many years after her death, claiming it as his own, building upon it, and improving it. He, at length mortgaged it, and the land being sold, after his death, upon a foreclosure of that mortgage, was purchased by the Defendant Cairns; against whom the Heirs at Law of Mrs. Ryers commenced an Action of Ejectment. SPENCER, Ch. J. delivering the Opinion of the Court, after deciding that Ryers was but a Tenant at Sufferance, and that his possession was not adverse, said; "We perceive, then, that Ryers' continuance in possession after the termination of the estate he held in right of his wife, was a tenancy at sufferance, not tortious as regarded the true owners, and, consequently, not hostile or adverse to their right. His

years before the marriage, upon a third person for life, and the steward of the manor, appointed by the heir-at-law and her husband, had constantly debited himself with the receipt of two-thirds of the rent for the husband, on account of his wife, and the remaining one-third for the annuitant; yet, as no surrender had been made to the trustees of the annuitant, it was held, that such payment to him must be taken to be with the consent of the person entitled by law to the whole premises, so as to do away the notion of adverse possession by the husband of that third, distinct from his possession of the other two thirds, as tenant by the courtesy after the wife's death.

So, also, where a copyholder, with the licence of the lord, leased the copyhold lands for forty years, with a proviso for re-entry, if the rent should be in arrear, and made a will, devising such copyhold lands to A., and died, twenty years of the lease being then unexpired, and the heir-at-law received the rent from the lessee, from the time of the death \*of the copyholder until the expiration of the lease, [ \*52 ] and for ten years afterwards, when the devisee brought an action of ejectment; it was holden, that the devisee was not barred of this remedy by the statute of limitations, although more than twenty years had elapsed from the time of the death of the testator, and the forfeiture of the lease by non-payment of rent to the devisee; for, until the termination of the lease, the devisee had no right to enter, except for the forfeiture; and although he might have entered by reason of the forfeiture, yet he was not bound to do so.(n)[1]

(n) *Doe, d. Cook, v. Danvers*, 7 East, 289.

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"claim of title and building on the premises, can have no effect, for it does not appear that this was ever brought home to the knowledge of the lessors. I do not mean to admit, that had the claim been known to them, that a mere claim of title by a tenant at sufferance would create a disseisin, or a possession adverse to the true owner. It is unnecessary to decide upon the operation of the mortgage by *Ryers* to *Wals*, in 1800, or whether that constituted an adverse possession, although I am of opinion it did not; and that there never was an adverse possession until *Cairns'* entry, subsequent to the sale in 1805."

"I have been more particular in stating the reasons of the decision of the Court in this case than was necessary, as all the principles were decided by this Court upon a state of facts between the same lessors and *Cairns*, on a former occasion, but that decision was not reported. We then decided, that *Ryers'* continuance in possession was not adverse, and that the lessors were not barred by the Statute of Limitations."

[1] In *Wells vs. Prince*, (9 *Mass. Rep.* 509.) the Court said; "The

So, also, where the rents, issues, and profits of a trust estate were received by a *cestui que trust* for more than twenty years after the creation of the trust, without any interference of the trustees, such possession, &c. being consistent with, and secured to, the *cestui que trust*, by the terms of the trust-deed, the receipt was held not to be adverse to the title of the trustees, so as to bar their ejectment against the grantees of

"defence in this case is, that the devisee for life having never entered, her refusal to accept the devise is to be presumed: and then the right of entry of the petitioner or remainderman having accrued immediately, he was bound to enter within twenty years; and having failed so to enter, his right of entry is gone, without which he cannot maintain this process. That those in remainder might have entered immediately on the refusal of the devisee for life to accept the devise is true. But one may have different rights of entry; and although the devisee for life refuses to accept the estate devised, and the remainderman thereby acquires an immediate right of entry, yet he is not obliged to avail himself of his right so accruing, but he may enter after his second right accrues by the death of the tenant for life."—& *Vide Wallingford vs. Hearl*, 15 *Mass. Rep.* 472.

In the case of *Stevens & Uz. vs. Winship & Uz.* (1 *Picker. Rep.* 327.) WILDE, J. delivering the Opinion of the Court, said; "As to the objection of forfeiture, it is sufficient to remark that the demandants do not claim a right of entry arising from forfeiture. If a forfeiture were incurred, the demandants were not bound to enter; *Due d. Cook v. Danvers*, 7 *East*, 321; *Wells v. Prince*, 9 *Mass. Rep.* 508; and if the right to enter for that cause is now barred by the statute of limitations, this does not affect the right of entry arising afterwards on the death of tenant for life. If there be two rights of entry, one may be lost without impairing the other. *Wells vs. Prince*; *Hunt vs. Burn*, 2 *Salk.* 422."

In the case of *Jackson ex dem. M'Crea vs. Mancius & Al.* (2 *Wend. Rep.* 357, 368.) it was contended on the part of the Defendant that the alienation in Fee by a Tenant by the Curtesy, wrought a Forfeiture of his own life-estate in the Premises; and that the Reversioner was bound to enter for such forfeiture, and could not wait until the termination of the life-estate. But SAVAGE, Ch. J., delivering the Opinion of the Court, said; "That if a forfeiture was shewn, yet the reversioner is not bound to enter until the natural termination of the life estate, as the law does not require him to look after the life estate, the presumption being that the tenant in possession holds by such a conveyance as the tenant for life had a right to give."

"In a fine by a tenant for life, which as soon as levied operates a forfeiture, and the remainderman or reversioner may enter presently, but is not bound so to do; and therefore the law gives him five years after the death of the tenant for life, because he has no reason to look until the natural determination of the estate."—*Earl of Pomfret vs. Ld. Windsor*, 2 *Ves. Sen'r. Rep.* 482. (Per LORD HARDWICKE, CH. pronouncing his Decree.)

[2] The possession of the *cestui que trust*, is not adverse to the title of

the *cestui que trust*, brought after the twenty years.(o)[2] And, indeed, as the *cestui que trust* is a tenant at will(p) to the trustees, and his possession is the possession of the trustees,[3] the statute will never operate between trustee and *cestui que trust*.[4] except in very particular ca-

(o) *Keane, d. Lord Byron v. Deardon*, 8 East, 248.

(p) *Gree v. Rolfe*, 1d. Raym. 716.

the trustee. *Smith ex dem. Dennison & Al. vs. King & Al.* 16 East's Rep. 283. & *Vide Sir William Smith vs. Wheeler*, 1 Ventris' Rep. 129.

And it is a maxim that no conveyance by *cestuy que trust*, can work a forfeiture of the legal estate of the trustee, it has been held that a fine or other alienation by *cestuy que trust* for life, does not work a forfeiture of his life estate. *Sanders on Uses*, 201.

In the case of *Lethieullier vs. Tracy*, (3 Atk. Rep. 729, 730.) HARDWICKE, LORD CHANCELLOR, said, "I will suppose for argument's sake, that Mrs. Tracy had levied a *fine sur concessit* of her estate for life; yet "as it is a trust estate, and there are limitations to trustees to preserve contingent remainders, I am of opinion that it does not work a forfeiture of "her estate for life, because it cannot at all hurt or affect the subsequent "remainders, as there are trustees under the will to preserve them, and "therefore such a fine would in Equity operate at most as a grant only "of such interest as she had a power to grant."—"A Court of Equity will "never construe such a fine to work a wrong, but it operates only on the "trust to preserve the contingent remainders and not on the legal estate; "for Lord Talbot in the case of *Hoskins and Hoskins*, and myself in a "cause that came before me afterwards, were of opinion, that a person so "intrusted levying a fine creates no wrong, but operates so as to grant all "the conveyer had a power to grant."

[3] *Cestui que trust*, is "tenant at will" to the Trustee, and the possession of the *cestui que trust* is "the very possession, in consideration of law of the trustees," *Earl of Pomfret vs. Lord Windsor*, 2 Ves. Sen'r. Rep. 481. & *Vide to the same Purport, Lethieullier vs. Tracy*, 3 Atk. Rep. 729, 730.

*Cestui que trust*, is tenant at will to his trustee, and his possession is the possession of the trustee. *Dighton vs. Greenvil.* (In Error.) 2 Ventris' Rep. 329.

[4] The Statute of Limitations "does not reach to matters of direct "trust, as between trustee and *cestui que trust*." *Coster & Al. vs. Murray*, 5 Johns. Ch. Rep. 531. *Turner & Al., Exors. vs. Debell, Exor.*, 2 Marsh. Rep. (Ky.) 384.

Nor to parties standing in the relation of principal and agent or factor. 5 Johns. Ch. Rep. 531.

"This is a trust estate, against which the limitation does not run or operate." *Gist & Al. Representatives, &c. vs. Heirs, &c. of Cattell*, 2 Equity Rep. (Dessaussure) 55. & *Vide West vs. Randall & Al.*, 2 Mason's Rep. 203.

"It is equally said that fraud as well as trust is not within the Statute."



ses ; although it seems, that if a *cestui que trust* sell or devise the estate,

*Kane vs. Bloodgood*, 7 Johns. Ch. Rep. 122. (Per KENT, Ch.) & *Vide Exo'rs. of Hunter & Al. vs. Spotswood*, 1 Wash. Rep. 145.

As a rule the Statute of Limitations does not operate in cases of fraud and of trusts ; but as soon as the fraud is discovered it commences to run. *Wamburzee & Al. vs. Kennedy & Al.* 4 Eq. Rep. (Dess.) 479. *Sweat vs. Arrington, Adm'r. &c.*, 2 Hayw. Rep. 129.

It is a settled rule, that the Statute of Limitations cannot, either in a Court of Law, or Equity, protect a trustee against the demands of his *Cestui que trust*. *Thomas vs. White & Al.*, 3 Littell's Rep. 177, 181.

Trustees cannot urge the lapse of time against the *Cestui que trust*. *Trustees of Lexington vs. Heirs of Lindsay*, 2 Marsh. Rep. (Ky.) 445.

A trustee cannot take advantage of the Act of Limitations, against the claim of the *Cestui que trust*, or of persons claiming under him. *Redwood vs. Riddick & Uz.*, 4 Munf. Rep. 222.

"So long as the trust subsisted, so long it was impossible that the *Cestuis que trust* could be barred. The *Cestuis que trust* could only be barred "by barring and excluding the estate of the trustee." *Cholmondeley vs. Clinton & Al.* 2 Meriv. Rep. 360.

Land was devised to A. in trust to apply the rents and profits to the support of B. during his life, and in an action by the *Cestui que trust* against the trustee to recover the rents and profits, it was Held, that the general Statute of Limitations does not apply to trusts. *Hemenway vs. Gates, Administrator, &c.*, 5 Picker. Rep. 321.

"It is true, the Statute of Limitations cannot be pleaded against a breach "of trust, nor can a person who has taken a conveyance from the trustee "shelter himself under a plea of that Statute." *Boteler vs. Allington*, 3 Atk. Rep. 459. (Per HARDWICKE, LORD CHANCELLOR.)

"It is certainly true that length of time is no bar to a trust clearly established ; and in a case where fraud is imputed and proved, length of "time ought not, upon principles of eternal justice, to be admitted to repel "relief. On the contrary, it would seem that the length of time, during "which the fraud has been successfully concealed and practised, is rather "an aggravation of the offence, and calls more loudly upon a Court of Equity "to grant ample and decisive relief. But length of time necessarily obscures all human evidence ; and as it thus removes from the parties all "the immediate means to verify the nature of the original transactions, it "operates by way of presumption in favour of innocence, and against imputation of fraud." *Prevost vs. Gratz & Al.*, 6 Wheat. Rep. 497, 498. (Per STORY, J. delivering the Opinion of the Court.)

"A trustee cannot avail himself of the Act of Limitations ; and it requires plain, strong and unequivocal proof of his renunciation of the trust "to divest himself of it for the purpose of benefiting himself by the Act of "Limitations, to destroy the rights and interests of the *cestui que trust*. "Length of possession is the strong fact on which the presumption was "prayed. The possession is accounted for by the proof, which shows how "it was acquired by *Darnall*, how continued, and how transmitted to his "representatives, not inconsistent with his moral duties, his probity or "honour, nor in derogation of the rights and interests of the creditors and

and the vendee or devisee obtain possession of the title deeds, and en-

"legal representatives of *J. Fishwick*, but for the preservation of the property for the benefit of her creditors and legal representatives. And by "this proof is the presumption most conclusively repelled." *Per CHASE*, Ch. J. *delivering the Opinion of the Court of Appeals.*) *Fishwick's Admr. vs. Sewell*. 4 *Harr. & Johns. Rep.* 430. [This was not a case of direct trust, but of trust by *Implication* or *Construction of Law*.]

A purchaser for a valuable consideration, if affected with notice, becomes a trustee for the true owner, and will not be protected by the Statute of Limitations. *Wamburzee & Al. vs. Kennedy & Al.* 4 *Eq. Rep. (Dess.)* 474. & *Vide Thayer, Assignee, &c. vs. Cramer & Al.* 1 *M'Cord's Ch. Rep.* 395, 398.

If a *Bona Fide* purchaser, *without notice*, but who is a trustee by *Implication*, is to be affected by an Equity, that equity must be pursued within a reasonable time. *Shaver & Al. vs. Radley & Al.* 4 *Johns. Ch. Rep.* 310. & *Vide Thompson & Uz, & Al. vs. Blair & Al.* 3. *Murph. Rep.* 583.

A legacy or trust is not within the Statute of Limitations; but after a length of time payment will be presumed; yet such presumption may be rebutted by other circumstances; and what operation they should have is for the consideration of the jury. *Durdon Exor. &c. vs. Gaskill, 2 Yeates' Rep.* 268, 271.

In the case of *Van Rhyn vs. Vincent's Executors*, (1 *M'Cord's Ch. Rep.* 310, 313.) THE COURT, *Per NOTT, J.* said; "For although it is a "rule in the Court of Equity that lapse of time will be no bar between a "trustee and a *Cestui que trust*, yet that doctrine applies only to technical "equitable trusts, and not to those constructive trusts of which a Court "of Law as well as a Court of Equity have jurisdiction."

The rule that trust and fraud are not within the Statute of Limitations, is subject to this modification, that if the trust be constituted by the act of the parties, the possession of the trustee, is the possession of the *Cestui que trust*, and no length of such possession will bar; but if a trust be constituted by the fraud of one of the parties, or arises from a decree of a Court of Equity, or the like, the possession of the trustee becomes adverse, and the Statute of Limitations will run from the time the fraud is discovered. *Thompson & Uz, & Al. vs. Blair & Al.* 3 *Murph. Rep.* 583. & to the like *Purport, Vide Van Rhyn vs. Vincent's Ex'ors., 1 M'Cord's Ch. Rep.* 314.

An executor entering on Lands of the estate of his testator and occupying them, is to be considered as holding them in trust for the heirs or devisees, unless he proves that he held adversely with notice to the heirs or devisees; in which case, the proof lies on him to establish the claim at law, on an issue directed. *Ramsay & Uz. vs. Deas' Ex'or. &c.* 2 *Eq. Rep. (Dess.)* 233.

The Statute of Limitations is not allowed to run in favour of a man who was employed to act as agent, but purchased for himself: He is considered as a trustee; and his employer shall be entitled to the benefit of the purchase. *Hutchinson vs. Hutchinson*, 4 *Eq. Rep. (Dess.)* 77.

In the case of *Lessee of Bell vs. Levers*, (3 *Yeates' Rep.* 26.) SHIPPEN, Ch. J. in his Charge to the Jury, said; "As to the survey said to have "been made by John Seely for his own use in 1772, there is abundant

ter, and do no act recognizing the trustee's title, the statute will operate from the time of such entry.(q)

[\*53] \*In like manner the payment of interest upon a mortgage will prevent the statute from running against the mortgagee, although he may not have been in possession of the lands for upwards of twenty years, because such possession is consistent with the original agreement of the parties.(r)

It seems as yet a very unsettled point, whether an encroachment upon the waste adjoining to the demised premises, by a lessee, and uninterrupted possession thereof by him for twenty years, shall give to the lessee a possessory right thereto, or whether he shall be deemed to have enclosed the waste, in right of the demised premises, for the benefit of the lessor after the expiration of the term. Lord *Kenyon*, C. J., *Lee*, C. J., and *Thompson*, B., have held that the encroachment belongs to the lessee, whilst on the other hand, *Heath*, J., *Buller*, J., *Perry*, B., and *Graham*, B., have held that the landlord is entitled to it.(s)

(q) *Vide Sugden's Vendors and Purchasers*, 2 Edit. 241.

(r) *Hatcher v. Fineux*, Lord Raym. 740.

(s) *Doe d. Colclough, v. Mulliner*, 1 Esp.

460. *Creach v. Wilnot*, 2 Taunt. 160, (in notis.) *Doe d. Challnor, v. Davies*, 1 Esp.

461. *Bryan, d. Child, v. Winwood*, 1 Taunt. 208.

"ground to believe that it was not then made, and that it was improperly foisted into the office. He knew that he had made the survey for *Levers*, and at his expense; and as he could gain no title by his villainy and breach of trust, so neither could he communicate any to *Towers*, by his conveyance of the 19th May, 1775."

In the case of *Starr vs. Starr & Al.*, (2 *Ohio Rep.* [Hamm.] 321, 328.) THE COURT said; That this trust was not formally declared or expressed between the parties, is no reason why it cannot exist. The law is not to be evaded by contrivances of this nature. A trust tacitly created is more difficult to reach than one that is expressed; but where it is ascertained, the same consequence is attached to it."

The general rule is, that after a sale of land, and before a conveyance of the legal title, the Vendor is the trustee of the Vendee, and the Act of Limitations will have no operation. But where the Vendor disavows the trust, and after having delivered possession to the Vendee, makes a lease to a third person in opposition to the title of the Vendee, and the lessee enters and holds possession, the jury may presume a disseisin, and if the Vendee suffers twenty-one years to elapse without prosecuting his claim, it will be barred by the Act of Limitations. *Pipher & Al. vs. Lodge*, 4 *Serg. & R. Rep.* 310.

But, to prevent length of time from barring a claim, on the ground that the possession of the defendant was *fiduciary*, such possession must have been *fiduciary as to the Plaintiff or those under whom he claims*: it's being *fiduciary as to any other person*, is not sufficient. *Spotswood vs. Dandridge & Al.* 4 *Hen. & Munf. Rep.* 139.

But, at all events, it seems clear, that such possession will be adverse to the rights of the commoners, and, indeed, to the lord himself, excepting as landlord at the expiration of the lease.(1)

\*It should, however, be observed, that although twenty [\*54] years peaceable possession will undoubtedly be a good title against the lord, *qua* lord, if the possession were, in the first instance taken in defiance of him, and no acknowledgment at any time afterwards made, yet, that if the possession be at first by the lord's permission, or the party subsequently make an acknowledgment that the lands were originally so taken, the statute will never run against the lord; for the possession of a tenant at will, for ever so many years, is no disseisin.(u)[1]

Thirdly, an adverse possession will be negatived when the party claiming title has never, in contemplation of law, been out of possession.[2]

(1) *Creach v. Wilmot*, 2 Taunt. 180, (in notice.)

(u) B. N. P. 104.

[1] The possession of a tenant at will, is the possession of the person under whom he claims. *Jackson ex dem. Young & Al. vs. Ellis & Al.* 13 Johns. Rep. 120, 121.

After the expiration of his term, a tenant for years, becomes, by continuing in possession, a tenant at sufferance. *Wilde vs. Cantillon*, 1 Johns. Cas. 124. *Jackson ex dem. June vs. Raymond*, *Ibid.* 86. (In Notice.)

And his possession is not a *Disseisin* of his landlord, except by election. *Jackson ex dem. June vs. Raymond*, *Ibid.* 85.

If tenant at will execute a lease and give possession of the premises to his lessee, the owner of the land is not thereby disseised. *Jackson ex dem. Van Alen vs. Rogers*, 1 Johns. Cas. 33.

Nor is his conveyance in fee a *Disseisin*, unless at the election of his landlord. *Jackson ex dem. Van Schaick & Al. vs. Davis*, 5 Cowen's Rep. 134.

And even the holding over of a tenant for life, after the determination of his estate, though he claim the fee, is not a disseisin of the rightful owner. *Varick & Al. vs. Jackson ex dem. Eden & Al.* (IN ERROR.) 2 Wend. Rep. 166. *Lion ex dem. Eden vs. Burtiss & Al.* 20 Johns. Rep. 491.

It is "not a *Disseisin*, but a mere *deforcement*, which is defined to be "the holding of any lands or tenements to which another person hath "right." *Lion ex dem. Eden vs. Burtiss & Al.* 20 Johns. Rep. 491. (Per SPENCER, Ch. J. delivering the Opinion of the Court.)

[2] This point is decided in *Barr vs. Gratz's Heirs*, 4 Wheat. Rep. 223, *Mather vs. The Ministers of Trinity Church & others*, 3 Serg. & R. Rep. 509. *Cluggage & others vs. Duncan's Lessee*, 1 lb. 118. *Proprietors of*

Thus, when *A.* devised lands to *B.*, and his heirs, and died, and *B.* died, and the heir of *B.*, and a stranger entered and took the profits for

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*the Kennebeck Purchase vs. Springer*, 4 *Mass. Rep.* 418. & *Vide, Gay vs. Moffit*, 2 *Bibb's Rep.* 508. *Green vs. Litch & Al.* 8 *Cranch. Rep.* 229. *Commonwealth vs. McGowan*, 4 *Bibb's Rep.* 62. *Chiles vs. Calk*, 4 *Ibid.* 554. *Harlock & Al. vs. Jackson*, 1 *Constit. Rep.* 135. *Bryant vs. Allen & Al.* 2 *Hayw. Rep.* 74. *Sawyer vs. —*, *Ibid.* 235. *Symonds vs. True Blood*, *Ibid.* 235. *Herd vs. Bodley*, 5 *Littell's Rep.* 88. *Smith & Al. vs. Morrow*, 5 *Littell's Rep.* 210. *Taylor vs. Shield's Heirs*, 5 *Littell's Rep.* 296. *Daniel vs. Ellis & Al.*, 1 *Marsh. Rep. (Ky.)* 60. *Codman & Al. vs. Winslow*, 10 *Mass. Rep.* 151. *Commonwealth vs. Dudiey*, 10 *Mass. Rep.* 408. *Wells vs. Prince*, 4 *Mass. Rep.* 64.

"He who makes title to a tract of land, and is in possession of part, is in possession of the whole according to the true limits and real position of the land." (*Per CHASE, J.*) *Ridgely's Lessee vs. Ogle & Al.* 4 *Har. & M'Hen. Rep.* 129.

† Possession of a part is a possession of all the land covered by a party's title. *Anderson ads. Darby*, 1 *Nott & M'Cord's Rep.* 369. *Brandon ads. Grimke*, *Ibid.* 357.

Where one enters into land having title, his seisin is not bounded by his actual possession, but is co-extensive with his title. But where he enters without title, his seisin is confined to his possession by metes and bounds. *Jackson ex dem. Sparkman vs. Porter*, 1 *Paine's Rep.* 458. & *Vide Clugge & Al. vs. Lessee of Duncan*, 1 *Serg. & R. Rep.* 111. *Davidson's Lessee vs. Beatty*, 3 *Har. & M'Hen. Rep.* 621.

"It is a principle of law, that he who has title to a tract of land, and is in possession of part, is in possession of the whole. A person holding land cannot occupy and use every part of his land, nor can he have every part under fence.

"It is a principle of law, that if two persons are in possession of the same land, the one by title, and the other by wrong, it is his possession who has the right.

"These principles are not only established by the decisions of the Courts, and acquiesced in, but are founded in justice and general convenience, favour right, and resist wrong and oppression." (*Per CHASE, Ch. J.*) *Hammond vs. Ridgely's Lessee*, 5 *Harr. & Johns. Rep.* 245, 264.

An adverse possession for twenty years, is not a bar to a Rector or Vicar, except as against the same incumbent who submitted to such possession. *Runsom vs. Doe ex dem. Cooper*, (*IN ERROR.*) 5 *Barnew. & Cress. Rep.* 696.

The state by virtue of its prerogative is always seised of the lands to which it has title; and may therefore convey them by release, notwithstanding the intrusion of strangers upon them. *Hill vs. Dyer*, 3 *Greenl. Rep.* 441.

The seisin of lands belonging to the Indian tribes is in the Sovereign, and the Indians are mere occupants. A purchaser from them can acquire only the Indian title, and they may resume it, and make a different disposition of it. An occupant under an Indian grant, the Indians having afterwards resumed the title, and granted it to the Crown, was held to be a tenant at will of the King, whose occupancy no length of time could ripen into a title by adverse possession. *Jackson ex dem. Sparkman vs. Porter*,

twenty years, upon ejectment brought by the devisee of the heir of *B.* against the stranger, it was held that this perception of the rents and profits by the stranger was not adverse to the devisee's title; because, when two men are in possession, the law adjudges it to be the possession of him who hath the right: [3] the lessor of the plaintiff, and the

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1 *Paine's Rep.* 458. & *Vide Cocke's Lessee vs. Dotson & Al.* 1 *Tenn. Rep.* 169. *Johnson vs. McIntosh*, 8 *Wheat. Rep.* 571, & *Seq. Fletcher vs. Peck*, 6 *Cranch. Rep.* 142. *Jackson ex dem. Klock & Al. vs. Hudson*, 3 *Johns. Rep.* 384, 385.

[3] "In every case of a mixed possession, the legal seisin is according 'to the title.'" *Codman & Al. vs. Winslow*, 10 *Mass. Rep.* 151. *Commonwealth vs. Dudley*, *Ibid.* 408.

"Where two are in mixed possession of the same land, one by title and 'the other by wrong, the law considers him having the title as in possession, 'to the extent of his right.'" (Per BUCHANAN, J. *delivering the Opinion of the Court*) *Cheney vs. Ringgold & Al.*, 2 *Harr. & Johns. Rep.* 87, 94.

"Where two persons are in possession the one by right, and the other 'by wrong, it is the possession of him who is in by right.'" (Per CHASE, Ch. J. *delivering the Opinion of the GENERAL COURT.*) *Hall vs. Gitting's Lessee, & Gitting's Lessee vs. Hall*, 2 *Harr. & Johns. Rep.* 112, 115. This cause was carried to the COURT OF APPEALS, upon *cross appeals* by each party; and the COURT OF APPEALS, at *December Term*, 1807, affirmed the Opinion of THE GENERAL COURT, on both appeals, concurring in the Opinions pronounced in the several Bills of Exceptions. *Ibid.* 130.

Where two persons are in possession of land, each claiming an exclusive right, the law adjudges the rightful possession to be in the one who has the right to the land. *Mather vs. The Ministers of Trinity Church & Al.*, 3 *Serg. & R. Rep.* 509.

"Where two are in possession of a tract or a house, it is his possession 'who has the right. (Per CHASE, Ch. J. *delivering the Opinion of the Court.*) *Davidson's Lessee vs. Beatty*, 3 *Har. & M'Hen. Rep.* 621.

"There would appear to be no clearer principle of reason and of justice, 'than this, that if the rightful owner is in the actual occupancy of a part 'of his tract by himself, or tenant, he is in the constructive and legal possession, and, seisin of the whole, unless he is disseised by actual occupation and dispossession. If this were not the law, the possessor by wrong, 'would be more favoured than the rightful possessor. Here are two, each 'in actual possession and occupation, of part of a surveyed tract, the owner, and an intruder. Who then is in possession of the part not occupied 'by inclosure by either? The man who has no right but by disseisin of a 'part, or he, who is in the actual occupancy of a part, and the rightful owner of the whole? In this kind of mixed, constructive possession, the legal seisin is according to the title. Title draws possession to the owner. 'It remains until he is disseised, and then no further than actual dispossession by a trespasser, who cannot acquire a constructive possession, 'which always remains with the title.'" *Hall & Al. vs. Powell*, 4 *Serg. & R. Rep.* 465. (Per DUNCAN, J. *delivering the Opinion of the Court.*)

"According to Lord Holt, (1 *Salk.* 246.) a bare entry on another, with-

defendant, were not tenants in common, for the defendant was [ \*55 ] a mere stranger ; and, though he took \*a moiety of the profits, that would not make him a tenant in common ; for a man cannot disseise another of an undivided moiety, as he may of such a number of acres.(v)

From the principle that the possession of one joint tenant, parcener, or tenant in common, is *prima facie* the possession of his companion also, (w)[1] it follows, that the possession of the one can never be con-

(v) *Reading v. Rawsterne*, Ld. Raym. 829. *Dale*, Hob. 120. *Doe, d. Bernet, v. Keen*, 7 T. R. 386.  
(w) *Ford v. Gray*, Salk. 285. *Smales v.*

"out an expulsion, makes such a seisin only, that the law will adjudge him "in possession that has the right." *Smith ex dem. Teller & Al. vs. Burtis & Al.*, 6 Johns. Rep. 218. (Per KENT, Ch. J. delivering the Opinion of the Court.) & *Vide Codman & Al. vs. Winslow*, 10 Mass. Rep. 151. *Commonwealth vs. Dudley*, Ibid. 408.

"Although there may be a concurrent possession, there cannot be a concurrent seizin of lands : and one only being seized, the possession must "be adjudged to be in him because he has the right." *Langdon vs. Potter & Al.*, 3 Mass. Rep. 219. (Per PARSONS, Ch. J. delivering the Opinion of the Court.)

Where surveys interfere, the Act of Limitations has no operation against him who has the best right, unless his opponent takes an adverse and exclusive possession. Where there is no interference, possession of part is possession of the whole. *Burns vs. Swift & Al.*, 2 Serg. & R. Rep. 436.

Where a part of a tract of land is included in A's deed or patent, and the same part is also included in B's deed or patent, and each grantee is settled upon that part of the land comprised in his deed or patent, although not upon that included in both deeds, the possession of the part included in both conveyances, is in him whose deed or patent is the elder ; but if one of them is actually settled for seven years together, upon the part comprehended in both deeds, the possession is *his*, and the other will be barred thereby. *Doe ex dem. Orbison vs. Morrison*, 1 Hawk's Rep. 467.

Where one conveyed lands in fee with general warranty, and a stranger at the same time was seised in fact of part of the same land by an elder and better title, the entry of the Grantee under his deed gives him seisin only of that part of which his grantor was seised ;—but as to the stranger, the entry of the Grantee is a mere trespass. *Cushman vs. Blanchard & Al.*, 3 Greenl. Rep. 266.

[1] "The possession of one tenant in common recognizing the title of his "co-tenants, is, in legal consideration, the possession of all." *Barrett & Uz. vs. French*, 1 Conn. Rep. 364. (Per SWIFT, Ch. J. delivering the Opinion of the Court.) & *Vide Bryan vs. Atwater*, 5 Day's Rep. 188.

"The possession of tenants in common is one and undivided, neither can "one alone support an action of trespass. The possession of one, therefore, is the possession of all, and if one enters generally, without saying "for whom, it will be implied, that he enters according to law ; that is to

sidered as adverse to the title of the other, unless it be attended by circumstance demonstrative of an adverse intent ; [2] or, in other words, whenever one joint tenant, tenant in common, or parcener, is in possession, his fellow is, in *contemplation of law*, in possession also ; and it is necessary to prove an *actual ouster*, to rebut this presumption. [3]

" say, for himself and the others. I find a case, in which it was expressly decided, that the entry of one tenant in common, shall enure to the benefit of another, as regards *strangers*. (*Small vs. Dale*, *Hob.* 120. *Moor*, 868. 14 *Vin.* 512. *P. a. pl.* 1.)" *Carothers & Al vs. The Lessee of Dunning & Al.* 3 *Serg. & R's. Rep.* 381, (*Per* TILGHMAN, Ch. J.) *Same case*, pages 385, 386, *the like Opinion by* GIBSON, J.

But in the case of *Doolittle & Uz. vs. Blakesley*, (4 *Day's Rep.* 273.) BRAINERD, J. *who delivered the Opinion of the Court*, said, " In case of tenants in common, as before observed, the possession of one is the possession of the other as it respects themselves. But as it respects strangers it is totally different. One tenant in common, as it respects his fellow tenant, is always safe in the possession of his fellow tenant, unless ousted. But when disseised, either by a fellow tenant, or a stranger, he has his remedy in his own right upon his own individual title ; and if he will not exercise this right within the 15 years, he must suffer the consequences of an adverse possession, and lose his estate."

" It must be conceded that an action for Partition, speaking of it in general terms, can be proscribed against only by a lapse of thirty years, and not even by this or any other much greater length of time when the partners or co-heirs possess in common an inheritance or property." *Gravier & Al. vs. Livingston & Al.* 6 *Mart. Rep.* 410. (*Per* MATTHEWS, J. *delivering the Opinion of the Court.*)

Purchasers under the same title, without partition, cannot prescribe against each other, by the lapse of ten years. *Broussard vs. Duhamel*, 3 *Mart. Rep.* (N. S.) 11.

" When property is held by husband and wife, to which one has a right, the legal possession follows the title." *Clark's Heirs. vs. Barkham's Heirs*, 4 *Mart. Rep.* (N. S.) 415, (*Per* PORTER, J. *delivering the Opinion of the Court.*)

[2] " That one tenant in common may oust his co-tenant and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not we think to be construed into an adverse possession." *M'Clung vs. Ross*, 5 *Wheat. Rep.* 124, (*Per* MARSHALL, Ch. J. *delivering the Opinion of the Court*,) & *Vide Cuyler & Al. vs. Bradt & Al.* 2 *Caines' Cas. Er.* 335.

The fact, that one tenant in common is in possession of the estate, claiming to hold it by a deed covering the whole of it, is sufficient evidence of ouster to support ejectment by a co-tenant. *Clark vs. Vaughan*, 3 *Conn. Rep.* 191. & *Vide Leonard & Al. vs. Leonard*, 10 *Mass. Rep.* 283.

[3] " The law is, that nothing but an actual ouster, by one tenant in common, shall give him the exclusive possession. *Fairclaim ex dem.*



Some ambiguity, indeed, seems formerly to have prevailed [ \*56 ] \*ed, as to the meaning of the word *actual ouster*, as though it signified some act accompanied by real force ;(x) but it is now clear, that an actual ouster may be inferred from circumstances, which circumstances are matter of evidence to be left to the jury. [1]—Thus, thirty-six years sole and uninterrupted possession by one tenant in common, without any account to, demand made, or claim set up by, his companion, was held to be sufficient ground for the jury to presume an actual ouster of the co-tenant, and they did so presume.(y)[2]

(x) *Fairclain, d. Fowler, v. Shackleton*, (y) *Doe, d. Fisher. v. Prosser*. Cowp. 217. Burr. 2604.

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*Empson vs. Shackleton*, (5 Burr 2604." *Carothers & Al. vs. The Lessee of Dunning & Al.* 3 Serg. & R. Rep. 385. (Per GIBSON, J.)

One tenant in common cannot maintain Ejectment against his co-tenant without actual ouster. *Barnitz's Lessee vs. Casey*, 7 Cranch's Rep. 457. & *Vide Higbee & Al. vs. Rice*, 5 Mass. Rep. 351. *Doe ex dem. Gigner vs. Roe*, 2 Taunt. Rep. 397

After *nul disseisin* pleaded in a writ of entry, by a tenant in common, proof of actual ouster is unnecessary. *Stevens & Ux. vs. Winship & Ux.* 1 Picker. Rep. 318.

The Statute of Limitations will not run in favour of a purchaser for a valuable consideration, who had knowledge of the rights of parties, nor where he held as tenant in common, and during the minority of the other party. *Saxon & Ux. vs. Barksdale & Al.* 4 Eq. Rep. (Dessaus,) 522.

A person who has entered by the permission of one tenant in common cannot, a partition having been made, set up an adverse possession in bar of an action of Ejectment, by the tenant in common, to whose share the premises had fallen. *Jackson ex dem. Fisher vs. Creal & Al.* 13 Johns. Rep. 116.

"The Statute does not run in favour of one, against another tenant in common. If, however, there has been an actual ouster and adverse holding, the Statute of Limitations will run from the time of such Ouster and adverse possession." *Coleman vs. Hutchenson*, 3 Bibb's Rep. 212, (Per LOGAN, J. delivering the Opinion of the Court,) & *Vide Brackett vs. Norcross*, 1 Greenl. Rep. 91.—*Russell's Lessee vs. Baker*, 1 Har. & Johns. Rep. 71. *Doolittle & Ux. vs. Blakesley*, 4 Day's Rep. 273.

[1] "The question, whether the entry of a tenant in common is such as to accrue to the benefit of the others, and whether one has actually ousted another, are questions of fact, involving sometimes the intentions and motives of the party in possession; which it is the province of a jury to determine." *Cummings vs. Wyman*, 10 Mass. Rep. 468.

[2] In the case of *Jackson ex dem. Bradt & Al. vs. Whitbeck*, (6 Cow. Rep. 633,) SUTHERLAND, J. delivering the Opinion of the Court, said, "It appears to me, that admitting the premises in question to have descended to the children of *Bernardus Bradt*, as tenants in common, the evidence in the case warrants the presumption of an actual ouster of his co-tenants

So, also, if upon demand by the co-tenant of his moiety, the other refuse to pay, and deny his title, saying he claims the whole, and will not pay, and continue in possession, such possession is adverse, and ouster enough. (z) And, in like manner, where there were two joint tenants of a lease for years, and one bade the other go out of the house, and he went out accordingly, this was held to be an actual ouster. (a) [3]

Upon the same principle, although the entry of one is, generally speaking, the entry of both, yet if he enter *claiming the whole* to himself, it will be an entry adverse to his companion. (b) But where there was no circumstance to induce a supposition of an actual ouster, but a bare

(z) *Doe, d. Fisher, v. Prosser*, Cowp. 217.  
*Doe, d. Hellings, v. Bird*, 11 East, 49.

(a) Vin. Ab. v. 14, 512.  
 (b) Vin. Ab. 14, 512.

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" by *Hendrick*. Here has been an exclusive possession under claim of title, for forty years, without any assertion of right, or claim to any portion of the profits of the premises on the part of his co-tenants, although they all resided in the same county, within 40 miles of the premises." & *Vide Van Dyck vs. Van Beuren & Al.* 1 *Caines' Rep.* 84, to the like effect, & *Bryans vs. Atwater*, 5 *Day's Rep.* 188. *Brackett vs. Norcross*, 1 *Greenl. Rep.* 91.

[3] One tenant in common hindering the entry of the other is an ouster. *Gordon vs. Pearson*, 1 *Mass. Rep.* 323.

If one tenant in common sell the whole tract, and possession be held adversely, for twenty-one years, the sale and possession amount to an ouster of the co-tenant, who is barred by the Act of Limitations. *Culler & Al. vs. Motzer*, 13 *Serg. & R. Rep.* 356. (*In Error*.) This was an action of debt on bond, brought in the Court of Common Pleas of *Perry* county, by *Motzer*, the defendant in error and plaintiff below, against *Culler* and others, plaintiffs in error and defendants below, and issue was on the plea of payment. The bond was given for the purchase money of a tract of land, conveyed by *Motzer* to *Culler*, with covenants of warranty. The defence was, a defect of title, and an outstanding claim of Dower.

The title originated in an improvement made by *John Brown*, who in 1775 devised one half of it to *Mary Brown*, and the other half to *James Brown*. *Mary Brown* died intestate, leaving two children, *William Brown* and *Nancy Brown*, (now *Maxwell*.) *William Brown* thus became entitled to one fourth, and *Nancy* to one fourth, and in 1799, *William Brown*, and one *George Brown*, conveyed to *Martin Motzer*. In 1800, *William Brown* obtained a patent in his own name for the whole tract. In the deed from *George* and *William* to *Motzer*, it was recited, that on the — day of —, 1797, *Nancy Brown* or *Maxwell*, conveyed by deed her interest in the premises to them as tenants in common. *George* and *William* came into the possession of the land before 1799, and it had since continued in their possession, and the possession of those claiming under them. The widow of *George Brown* was still living. On these facts, the plaintiff below contended that the right of *James*, and the claim of *George's* wife to dower,

perception of the profits by one tenant in common for twenty six years, the possession was held not to be adverse.(c)[4] And where a tenant in common levied a fine of the whole premises, and afterwards [ \*57 ] took all the rents and profits for \*four or five years, but it did not appear that he held adversely at that time of levying the fine, it was held that such fine and receipt were not sufficient evidence of an ouster of his companion.(d) [1]

If, however, in cases of joint tenancy, &c. there be sufficient evidence of an actual ouster, the statute will run as in other cases.

Upon the principles here established, the possession of one heir in gavelkind is not the possession of the other, if he enter with an adverse intent to oust the other.(e)

Fourthly, when the possessor has acknowledged a title in the claimant.[2]

(c) *Fairclaim, d. Fowler, v. Shackleton*, East, 568, 571. *Sed Vide Story v. Windsor*, 5 Burr. 2604. 2 Atk. 630. 632.

(d) *Peaceable d. Hornblower, v. Read*, 1 (e) *Davenport v. Tyrrell*, Black. 675.

were barred by the Statute of Limitations. The *Supreme Court Held*, That the right of *James* was barred, but that the claim of *George's* wife to dower was not barred.

[4] "It is true that the mere perception of all the profits by one tenant in common, is not an ouster of another tenant in common." *Higbee & Al. vs. Rice*, 5 Mass. Rep. 351. (Per PARSONS, Ch. J. delivering the Opinion of the Court.)

"A bare perception of profits will not oust a tenant in common; and for the Statute of Limitations to operate as a bar, the possession must be adverse." *Morris' Lessee vs. Van Deren*, 1 Dall. Rep. 67. (Per M'KEAN, Ch. J.) & *Vide Lloyd vs. Gordon & Wife*, 2 Harr. & M'Hen. Rep. 260. *M'Clung vs. Ross*, 5 Wheat. Rep. 124. *Cuyler & Al. vs. Bradt & Al.* 2 Caines' Cas. Err. 335.

[1] If one of two tenants in Common of a reversion levy a fine of the whole, such fine does not require an actual entry by the other tenant in common to avoid it. *Doe ex dem. Truscott vs. Elliot*, 1 Barn. & Ald. Rep. 85.

[2] "Where one party claims under or through the other, there shall be no adverse possession in such case sufficient to give a title." 2 Esp. Ni. Pri. (old paging 435.)

If a defendant has acknowledged the title of the plaintiff, he cannot afterwards dispute it. *Jackson ex dem. Low. & Al. vs. Reynolds*, 1 Caines' Rep. 444. & *Vide Jackson ex dem. Viely & Clark vs. Cuerden*, 2 Johns Cas. 353. *Doe ex dem. Human vs. Pettett*, 5 Barn. & Ald. Rep. 223. *Les-*

Thus, where a lease for a long term had been granted, by the lord of

*see of Galloway vs. Ogle*, 2 Binn. Rep. 472. *Graham & Al. vs. Moore & Al.* 4 Serg. & R. Rep. 467. *Jackson ex dem. Van Schaick & Al. vs. Davis*, 5 Cow. Rep. 129, 130. *Jackson ex dem. Griswold & Al. vs. Bard*, 4 Johns. Rep. 230. *Brandier ex dem. Fitch & Al. vs. Marshall*, 1 Caines' Rep. 394. *Rowletts vs. Daniel*, 4 Munf. Rep. 473. *Jackson ex dem. Russell & Al. vs. Croy*, 12 Johns. Rep. 430. *Duvall & Al. vs. Bibb*, 3 Cull's Rep. 366. *Jackson ex dem. Dox vs. Jackson*, 5 Cow. Rep. 174. *Higginson vs. Mein*, 4 Cranch Rep. 419. *Hall vs. Doe ex dem. Surtees & Al.*, 5 Barnew. & Ald. Rep. 687.

In the case of *Jackson ex dem. Swartwout & Ux. vs. Cole*, (4 Cowen's Rep. 587, 598.) SUTHERLAND, J. delivering the Opinion of the Court, said, (after suggesting the presumption that the trustee had been reimbursed his advances and conveyed to the *cestuys que trust*.) "This presumption derives confirmation from the fact, as testified by *Morse*, that many portions of the land of *David Colden*, mentioned in the location and appraisement, had been held for upwards of thirty years under his heirs; and also from the circumstance, that the Defendant himself, as early as 1798, took a conveyance of the premises in question from one of the daughters of *David Colden* and the husbands of two others. Indeed, it may be questionable whether this is not a such recognition of the legal title of the heirs as to preclude the defendant from denying that it passed from the trustee to the *cestuy que trust*."

"It has been decided, and is the settled law of the Country, that a tenant shall not resist the recovery of his Landlord, by virtue of an adverse title acquired during his lease." *Lessee of Galloway vs. Ogle*, 2 Binney's Rep. 472. & *Vide Graham & Al. vs. Moore & Al.*, 4 Serg. & R. Rep. 467.

And even where the predecessors of the Defendant, had acknowledged the title of the claimant, it was Held that the Defendant was equally precluded from setting up the defence of adverse possession. *Jackson ex dem. Van Schaick & Others vs. Davis*, 5 Cow. Rep. 129, 130.

And to the same purport, *Vide Jackson ex dem. Griswold & Al. vs. Bard*, 4 Johns. Rep. 230. *Brandier ex dem. Fitch vs. Marshall*, 1 Caines' Rep. 394. *Rowletts vs. Daniel*, 4 Munf. Rep. 473.

Where the tenant of land for a year, held over, and after the expiration of his term paid rent to a stranger, and refused to quit the premises, being called upon by the agent of the lessor for that purpose; this was Held to be no *disseisin* of the lessor, not even at his election, nor such as would prevent the operation of a deed from the lessor to a third person. *Porter vs. Hammond*, 3 Greenl. Rep. 188.

Where A.'s tenant from year to year, takes a lease from B. the Act is void, and cannot work an adverse possession against A. *Jackson ex dem. Williams & Al. vs. Miller*, 6 Cow. Rep. 751.

The Defendant went into possession of land under *Gansevoort*, whom he supposed to be the owner of the soil; but afterwards believing that Mrs. Clark was the owner, he applied to her to purchase the land: after that application, Mrs. Clark conveyed the premises to *Viely*, who before bringing suit ordered the Defendant to leave the premises. Held,

the manor, to the rector, in which the lessee covenanted for himself, his

that the Defendant *could not set up an adverse possession of twenty years*; though he might shew that he made the application under a mistake, and prove a title out of the lessors of the plaintiff. *Jackson ex dem. Viely & Clark vs. Cuerden, 2 Johns. Cas. 353.*

"The repeated acts of the defendant, recognising the plaintiff's title "by applications to purchase from him both before and after he entered "into possession of the premises, afforded the strongest reason to presume that the defendant was in possession under *David Russell* [one "of the Lessors of the Plaintiff.] We are accordingly of opinion that "the plaintiff ought to have judgment." *Jackson ex dem. D. Russell & Al. vs. Croy, 12 Johns. Rep. 430. (Per YATES, J., delivering the Opinion of the Court.) & Vide Jackson ex dem. Brown & Al. vs. Ayres, 14 Johns. Rep. 224.*

If a stranger is in possession under or acknowledging the title of the devisee or remainderman it is equivalent to an actual entry. *Wells vs. Prince, 4 Mass. Rep. 64.*

A purchaser at a Sheriff's sale becomes *quasi* tenant, and it is not to be presumed that he holds adversely. *Jackson ex dem. Klein vs. Graham, 3 Caines' Rep. 189. & Vide Waring vs. Jackson ex dem. Eden & Al., 1 Peters Rep. (Sup. Ct. U. S.) 570.*

The possession of a defendant after a sale under an execution is not deemed adverse, for he becomes *quasi* a tenant at will to the purchaser. *Jackson ex dem. Kanes vs. Sternbergh, 1 Johns. Cas. 153. Russell vs. Doty, Sheriff, &c. 4 Cow. Rep. 576. & Vide Langdon vs. Potter & Al. 3 Mass. Rep. 128.*

A mortgagee, or direct purchaser from the tenant, or one who buys his right at a Sheriff's sale, assumes his relation to the landlord, with all its legal consequences, and is as much estopped from denying the tenancy. *Wilison vs. Watkins, 3 Peters. Rep. (Sup. Ct. U. S.) 50.*

One claiming under a deed from a judgment debtor has not such an adverse possession as will avoid a conveyance executed by a purchaser under an execution upon a judgment. *Jackson ex dem. Scofield vs. Collins, 3 Cow. Rep. 89.*

(*But in M' Raa vs Smith, [2 Bay's Rep. 339.] It was Held; That possession of land five years, under a sale from defendant, who has a judgment against him, will be a good bar against a judgment creditor or those claiming under him, who has lain by that time without reviving his judgment, or bringing suit against such possessor.*)

In ejectment brought by *Duval* and *Younghusband* against *Bibb* for a tract of land, the jury found a verdict for the plaintiffs subject to the Opinion of the Court on a case which stated, that *Robert Bibb*, by deed dated the 13th of December, 1788, and recorded on the 16th of the same month, conveyed the land to *Graves*. That *Bibb*, was, at that time, in actual possession, and had been so for upwards of twenty years. That *Graves* on the 28th of November, 1793, conveyed to *Duval* and *Younghusband*.

That there was no proof "that *Graves* was ever in actual possession, or ever entered upon the premises for the purpose of executing the last mentioned deed; but that the defendant now, and always hath had adverse possession of the premises against the said *Graves* and all holding by or under him, except as to the operation of the deeds aforesaid."

executors, and assigns, to pay, during the continuance of the term, a cer-

PENDLETON, President, *delivered the Opinion of the Court*; he said; —  
 “As to the twenty years possession in *Robert, [Bibb,]* prior to his conveyance to *Graves*, it only proves that he had a good title in ejectment, and a right to make that conveyance, and cannot operate as a bar by the Act of Limitation to the plaintiffs claiming under *Graves*, whose right of entry accrued only eight years before suit brought.

“The third and principal question is, whether the bargain and sale of *Graves*, (then out of possession) to the plaintiffs, passed his title to them? As an objection to its passing the title, the Statute and Act of Assembly against buying pretended titles, were relied on, as having in addition to the severe penalty on the buyer and seller of the land, made the conveyance void. It is unnecessary to consider whether those laws produced the effect contended for, since we are all of opinion that the purchase of the plaintiffs is not within the Act of Assembly, which has this exception: “Unless the person conveying, or those under whom he claims, shall have been in possession one whole year next before. [R. C. c. 103, § 1, ed. 1819.] Here *Graves* was the person conveying, and *Bibb*, the person in possession was him under whom *Graves* claimed; so that, literally, *Bibb* is excluded from making the objection; and, if it depended upon construction, could the plaintiffs possibly suppose, when they purchased, that *Bibb's* possession was adverse to the title of *Graves*, to whom he had conveyed the land with a general warranty?”

“The Court are therefore, of Opinion upon this point, that the title of *Graves* passed to the plaintiffs by the bargain and sale and gave them good title against *Bibb*: And upon the whole, that there is Error in the Judgment of the District Court which is to be reversed with costs, and judgment entered for the plaintiffs.” *Duval & Others vs. Bibb*, 3 Call's Rep. 366.

In the case of *Pender vs. Jones*, (2 Hayw. Rep. 294.) TAYLOR, J. said; “I am of opinion, that a deliberate avowal on the part of the possessor, of title in the claimant, or a serious assent to the validity of his title, will render an entry or claim unnecessary, and is equivalent in its effects to an entry or claim.”

The declaration of a widow in possession of premises, that she held them for her life, and that after her death, they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years adverse possession. *Doe ex dem. Human vs. Pettett*, 5 Barnew & Ald. Rep. 223.

Possession of land by consent of the true owner, is not adverse possession. *Atherton vs. Johnson*, New Hamp. Rep. (R. & W.) 31.

A defendant in Ejectment claiming the land by executory contract of purchase from the plaintiff, will not be permitted to contest the validity of the plaintiff's title. *Hamilton vs. Taylor*, Litt. Select. Cas. 444—5.

“A mere contract for a Deed, though the purchaser enter under it, does not place him in a situation to hold adversely, till he perform the condition of the purchase by paying the purchase money; such a possession not being hostile in its inception.” *Jackson ex dem. Young & Devereux vs. Camp*, 1 Cow. Rep. 610. *Botts & Al. vs. Shields' Heirs*, 3 Littell's Rep. 34. & *Vide Voorhies vs. White's Heirs*, 1 Marsh. Rep. (Ky.) 27.

tain annual rent, and also all the tithe straw of wheat and rye within the

A possession and claim of land, under an executory contract of purchase, is not such an adverse possession as will render a deed from the true owner void for champerty or maintenance; nor is it such an adverse possession as, if continued for 20 years, will bar an entry, within the Statute of Limitations; and especially, it is in no sense adverse as to the one with whom the contract is made. *Jackson ex dem. Swartwout & Wife vs. Johnson*, 5 *Cow. Rep.* 74. *And to the same purport, Vide Proprietors of No. Six vs. M'Farland*, 12 *Mass. Rep.* 325. *Higginbotham & Al. vs. Fishback*, 1 *Marsh. Rep. (Ky.)* 506. *Wilkinson, &c. vs. Nichols*, 1 *Monroe's Rep.* 36. *Richardson & Al. vs. Broughton*, 2 *Nott. & M'Cord's Rep.* 417. *Fowke vs. Darnall*, 5 *Litt. Rep.* 318. *Chiles vs. Bridge's Heirs*, *Litt. Select. Cas.* 423. *Kirk & Al. vs. Smith ex dem. Penn.*, 9 *Wheat. Rep.* 288. & *Vide Jackson ex dem. Marvin & Al. vs. Hotchkiss*, 6 *Cowen's Rep.* 401.

To constitute an adverse possession, it must not only be hostile in its inception, but the possessor must claim the *entire title*; for if it be subservient to, and admit the existence of a higher title, it is not adverse to that title. 5 *Cow. Rep.* 92. *Botts & Al. vs. Shields' Heirs*, 3 *Litt. Rep.* 34. *Proprietors of Township No. Six vs. M'Farland*, 12 *Mass. Rep.* 327. & *Vide Knox & Al. vs. Hook*, 12 *Mass. Rep.* 331.

Title by improvement, is merely a right of pre-emption, until the purchase is made from the commonwealth. Up to that time possession is not *adverse* to, but *under* the commonwealth; and therefore, though it continue twenty-one years, it is no bar by the Statute of Limitations to the commonwealth, or her grantee. *Morris vs. Thomas*, (*In Error*), 5 *Binney's Rep.* 77.

But where a man claiming under an executory contract for the purchase of land, is evicted and turned out of possession by a Writ of *Habere Facias Possessionem*, on an adversary claim, he may purchase in such adversary claim, and assert it in defence, against a suit brought by the heirs of the man from whom he first purchased. *Chiles vs. Bridge's Heirs*, *Litt. Select. Cas.* 420.

A cottage standing in the corner of a meadow (belonging to the lord of a manor,) but separated from it and from a high road by a hedge, had been occupied for above twenty years without any payment of rent. The lord then demanded possession, which was reluctantly given, and the occupier was told that if he was allowed to resume possession it would only be during pleasure. He did resume and keep possession for fifteen years more, and never paid any rent: *Held*, that the possession was not necessarily adverse, but might be presumed to have commenced by permission of the lord. *Doe ex dem. Thompson & Al. vs. Clark* 8 *Barnes & Cress. Rep.* 717.

It is an undoubted principle of law, fully recognized in this Court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates with full force to prevent the tenant from violating that contract by which he claimed and held the possession. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord; who reposes under the security of the tenancy, he-

parish, and the lessee and his assigns (the succeeding rectors) continued

lieving the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination by the lapse of time, or demand of possession. *Willison vs. Watkins*, 3 *Peters' Rep.* (Sup. Ct. U. S.) 47.

The same principle applies to a mortgagor and mortgagee, trustee and *cestui que trust*, and generally to all cases where one man obtains possession of real estate belonging to another by a recognition of his title. *Willison vs. Watkins*, 3 *Peters' Rep.* (Sup. Ct. U. S.) 48.

A holding of land under a bond from the patentee, cannot be considered as adverse thereto. *Fowke vs. Darnall*, 5 *Litt. Rep.* 317.

A person entering under a lease and holding over after his term has expired, will be regarded as holding by consent of the original landlord, and his possession is not adverse; and if he transfer the possession, his grantee is supposed to hold under the same title. *Brandier ex dem. Fitch vs. Marshall*, 1 *Caines' Rep.* 401 & *Vide Jackson ex dem. Van Schaick & Al. vs. Davis*, 5 *Cow. Rep.* 123.

Where the relation of landlord and tenant exists, a conveyance by the latter of the demised premises, cannot operate as the basis of an adverse possession, so as to bar the former of his ejectment; whether the grantee knew of the devise or not. But this rule means the conventional relation of landlord and tenant, where some rent or return is in fact received to the former; not a relation arising from mere operation of law; as where one makes a grant, and by the omission of the technical word *heirs*, an estate for life, only, passes.

In such case, after the death of the tenant for life, an adverse possession may commence running, in favour of those who enter and claim in fee under him, which after 25 years will bar all claim of the reversioner and his heirs. *Jackson ex dem. Webber & Al. vs. Harsen & Al.*, 7 *Cow. Rep.* 323.

And where *A.* entered into possession of land under a lease in fee, reserving a pepper corn rent, in 1775, and in 1778, gave the land to *B.*, by parol, who continued in possession, claiming under the lease, until 1798, excepting the period of the war, and a year or two after, and *B.* conveyed the premises to *C.*, and *C.* to *D.*, who conveyed the same to the Defendant; it was *Held*, that this was a sufficient adverse possession to bar an action of ejectment by the person having title to the land, commenced in 1807. *Jackson ex dem. Colden & Al. vs. Moore*, 13 *Johns. Rep.* 513.

*A.* being the owner of certain lands in the *Lunenburg* patent, died, after having devised the same to his wife during her widowhood, remainder to *B.* and his other three brothers; a dispute having arisen between *C.* the daughter of *B.*, and her husband, on one side, and the other devisees, on the other side, as to the portion of land to which she was entitled, her portion was ascertained and conveyed in 1772 to *C's* husband; and certain persons were appointed by the deed to locate and reduce to severally her share on any of the lands within the patent in the possession of the parties of the first part, (*the other Devisees and the Widow of A.*) or their tenants; the defendant entered upon the premises in question 23 years before the trial, claiming title under the husband of *C.*; and in an Action of Ejectment by persons claiming under *A.*, it was *Held*, that there was such an adverse possession in the Defendant as barred the action, and that it could not be repelled by shewing that he had obtained his possession from the



in possession for twenty years and upwards after the expiration of the term, without payment of rent, but during that twenty years suffered the heir of the lessor to take the tithe of the wheat and rye straw; it was held, that such sufferance was evidence of an agreement between the lessor and lessee, or their heirs and assigns respectively, that the lessee, or his assigns, should continue his possession, if the lessor, [ \*58 ] and his heirs, were permitted to receive \*the tithe as before, and that, consequently, there was no adverse holding in the assignee of the lessee.(f)

[ \*59 ] \*To enable a party to take advantage of the extension of time granted by the second section of this statute, it is necessary that the disability to enter should exist at the time when his title accrued;[1] for if he had the power to enter, but for an instant, no sub-

(f) *Roe, d. Pellat, v. Ferrars*, 1 Bos. and Pull. 542.

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tenants of the lessors of the plaintiffs, or their ancestors, as it was to be presumed, after such a lapse of time, that the persons appointed to locate the share of C. had located it upon lands in the possession of the tenants, as they were authorized to do. *Jackson ex dem. Livingston & Al. vs. Hul- lenbeck*, 13 Johns. Rep. 499.

When a tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is adverse, and as open to the action of his landlord as possession acquired originally by wrong. The act is conclusive on the tenant. He cannot revoke his disclaimer and adverse claim so as to protect himself during the unexpired time of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved and each party is to stand upon his right. *Willison vs. Watkins* 3 Peters' Rep. (Sup. Ct. U.S.) 49.

If the tenant disclaims the tenure, claims the fee adversely in right of a third person or in his own right, or attorns to another, his possession then becomes a tortious one, by the forfeiture of his right, and the landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his devise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his Ejectment he disclaims the tenancy and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and the tenant which can protect his possession from this adversary suit; and at the same time recover on the ground of there being a tenure so strong as that he cannot set up his adversary possession. *Ibid.*

[1] "The principle on which the Act of Limitations operates, is, that there must be a right of entry existing at the time of the bar, which can be affected; and when the person who is supposed to be affected, and those under whom he holds, had no right of entry, that right is not tolled."

sequent disability will be sufficient to arrest the operation of the statute.

*May's heirs vs. Hill*, 5 *Litt. Rep.* 313. (Per MILLS, J., delivering the Opinion of the Court.)

"It was declared, in *Jackson vs. Schoonmaker*, (4 *Johns Rep.* 390.) to "be the law, that the Statute of Limitations did not affect the right of a "remainder-man during the continuance of a particular estate; nor would "the acts or laches of the tenant of the particular estate, affect the party "entitled in remainder. The right of entry of the lessor did not accrue, "and could not exist during the estate by the curtesy." *Jackson ex dem. Beekman vs. Sellick*, 8 *Johns. Rep.* 269. & *Vide, Martin vs. Woods*, 9 *Mass. Rep.* 377. *Heath & Uz. vs. White*, 5 *Conn. Rep.* 228. *Doe ex dem. Colclough & Uz. vs. Hulse*, 3 *Barnew. & Cress. Rep.* 757. *Doe ex dem. Milner vs. Brightwen* 10 *East's Rep.* 583.

"The statute would work great injustice, if it were held to affect the "rights of reversioners or remaindermen during the continuance of the particular estate. Such was the view of the statute taken by this Court, in "*Jackson v. Schoonmaker*, (4 *Johns.* 390.) and *Jackson v. Sellick*, (8 "*Johns.* 262.)" *Jackson ex dem. Swartwout & Uz. vs. Johnson*, 5 *Conn. Rep.* 96. (Per SUTHERLAND, J.; and the like Opinion is given by SAVAGE, Ch. J., at pages 102, 103.)

If a person has not a right of entry, but only a possibility which may give a right of entry at a future day, the statute does not run against him until that right accrues. Hence, notwithstanding the next heir in tail releases to the tenant in tail in possession, the statute does not run against the releasor, until the death of the tenant in tail without issue. *Lessee of Hall vs. Vandegrift & Al.*, 3 *Binn. Rep.* 374.

In the case of *Stewart vs. Jackson*, (1 *Marsh Rep. (Ky.)* 59. ON APPEAL.) OWSLEY, J. who delivered the Opinion of the Court, said, "The "appellee relied upon an adverse possession for twenty years; but as the "appellant's right of entry is shewn to have accrued within twenty years, "according to the case of *Chiles against Calk*, (4th *Bibb*, 544,) the Court "improperly held his action to be barred by such a possession." & *Vide, Finlay & Al. vs. Humble & Al.* 2 *Marsh. Rep. (Ky.)* 570. *Murray, Adm'r. &c. vs. The East India Company*, 5 *Barnew. & Ald. Rep.* 204.

The right of entry on land accrues only with the emanation of the grant, and then the statute commences running. *Fowke vs. Darnall*, 5 *Litt. Rep.* 318.

Copyhold lands were granted to A. for the lives of herself and B., and in reversion to C. for other lives. A. died, having devised to B., who entered and kept the possession for more than twenty years. On his death C. brought ejectment: Held, that the action was barred by the Statute of Limitations, for that C's. right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land. *Doe ex dem. Foster & Al. vs. Scott.* 4 *Barnew. & Cress. Rep.* 706.

"If there be two rights of entry, one may be lost without impairing the other." *Stevens & Uz. vs. Winship & Uz.*, 1 *Picker. Rep.* 327. *Wells vs. Prince*, 9 *Mass. Rep.* 509. *Wallingford vs. Hearl*, 15 *Mass. Rep.* 472. *Jackson ex dem. M'Crea vs. Mancius & Al.*, 2 *Wend. Rep.* 366.

In the case of *Jackson ex dem. Swartwout & Uz. vs. Jackson*, (5 *Conn. Rep.* 103.) SAVAGE, Ch. J., said; "At what period of time, I would ask,

ute.[2] And the principle is the same where a disability, existing at the

"was it in the power of the heirs of Mrs. Cooper to have asserted their rights, before 1817, when *Thomas Cooper* [he was Tenant by the Curtesy,] died? Their infancy, I admit, is no excuse for them, as successive disabilities are not allowed. The statute was not operative until the death of Mrs. Cooper. It is true, indeed, that more than twenty years have elapsed since the adverse possession commenced; and more than ten years since the last disability was removed, which existed when the disseisin took place; but I would ask, when were the claimants guilty of laches? They were not bound to make an entry or claim till the death of Mrs. Cooper. And from that period till the death of the tenant for life, the law would not permit them to enter. Shall laches, then, be imputed to them? Certainly not. Whether *Colden Cooper* was born before or after the disseisin seems to me not to change the rights of the parties. The lessors of the plaintiff have brought their action within ten years after the operation of the statute upon their claim, and are not barred by it." & *Vide Ibid.* 95, 96.; (same Case,) for a similar Opinion by *SUTHERLAND, J.*

A person who was a minor at the time of the death of his ancestor, has five years after he comes of age to bring his action for the recovery of his lands. *Rochell* ads. *Holmes*. 2 Bay's Rep. 487. & *Vide Saxon & Ux. vs. Barksdale & Al.*, 4 Eq. Rep. (Dessauss.) 522. 528. *Den ex dem. Park vs. Cochran & Al.*, 1 Hayw. Rep. 170.

"It being a clear principle of law, that a possessor cannot avail himself of prescription against minors." *Calvit vs. Innis*, 10 Mart. Rep. 289. (Per *MATHEWS, J.*, delivering the Opinion of the Court.) & *Vide, Gayoso De Lemos vs. Garcia*, 1 Mart. Rep. (N. S.) 324.

A *Feme Covert* is allowed 7 years after discoveriture to sue for lands.—*Gore & Al. vs. Marshall & Al.*, 3 Marsh. Rep. (Ky.) 319.

Prescription does not run against the wife in favor of the purchasers of her property, although separated. *Prudhomme vs. Dawson & Al.*, 3 Mart. Rep. (N. S.) 161.

In the case of *Lamar vs. Jones & Al.*, (3 Harr. & M'Hen. Rep. 328, 332. ON APPEAL.) the bill stated that complainant's father mortgaged the premises, &c. on the 1st of October 1756, subject to a clause of redemption on the first of October, 1757, and continued in possession till his death in 1759, leaving a widow and complainant his only child. After the death of complainant's father, the mortgagee took possession of the premises, and on the 28th of March, 1760, the Heir of the mortgagee sold the land to the ancestor of the defendants, for £100. That the complainant on the 7th of November, 1783, paid the mortgagee's agent the principal and interest due on the said mortgaged premises, and which were released to him. That the complainant tendered to the defendants the sum of £150; that the defendants have made considerable profits from the land, &c.

The defendants in their answer set up the length of time in bar to the complainant's claim and right of redemption. It appeared from testimony that the complainant was about twelve years old when his father died.

[2] "The general rule is, that when the Statute of Limitations once begins to run, it continues to run, notwithstanding any subsequent disability." *Peck vs. Randall's Trustees*, 1 Johns. Rep. 176. (Per *KENT*, Ch. J

time of the commencement of the title, is afterwards removed, and a

The Chancellor, HANSON, on the 9th of March, 1791, decreed that the complainant was not entitled to the relief prayed by his bill, and dismissed the same, assigning as his reasons, that "the time limited by law for making an entry into lands hold under an adverse title having with great propriety been adopted by the Court of Chancery in *England*, for barring the redemption of lands held peaceably under a mortgage, after the day of payment; and the said limitation having already been adopted by this Court, and the time within which an entry may be made on lands held by an adverse title, being either twenty years after the right accrued, or ten years after the arrival at full age, in case the right accrued to the person claiming during his infancy; and the Chancellor being of Opinion, that inasmuch as the Legislature of this State did not think proper to suspend, during the late war, the operation of the Acts of Limitation with respect to a right of entry, (as it did in other cases,) this Court ought not, by allowing a suspension, to introduce a variance between the rules of law and the rules of equity, which have so often by Chancellors in *England*, been declared the same with respect to the limitation of suits; and the Chancellor being further of Opinion, that even if a suspension be allowed by this Court, it could not be allowed for more than four years, it being well known that during the war there was no obstruction to the prosecution of suits in this Court for more than the said number of years, since the possession of the mortgagee, and almost twenty years since the arrival at full age of the complainant had elapsed before the filing of this bill. It is therefore, this 9th day of March, 1791, by the Chancellor and the authority of this Court, adjudged, &c. that the complainant is not entitled to the relief prayed by his bill, and that the said bill be dismissed, but without costs."

But this cause being carried up by Appeal, the Court of Appeals, in June, 1793, gave the following Opinion:

"It is laid down as a rule, that mortgages are held not to be within the Statute of Limitations; but it was thought reasonable to establish a period at which, *prima facie*, the right of redemption shall be presumed to be deserted by the mortgagor, unless he be capable of producing circumstances to account for his neglect; and Chancery having adopted a variety of those circumstances, to wit, fraud, acknowledgment, infancy, ignorance, lawsuits, &c. of most of which the parties cannot avail themselves at Common Law, there is certainly a deviation in such cases from its strictness.

"No case has been cited to show that Courts of Chancery have adopted that part of the clause of the statute of 21 Jac. I. which allows infants the liberty, after the twenty years are expired, to bring actions within ten years after their coming to full age; and the Judges, after diligent search, not being able to find any, although from the year 1624 in which the statute was made, to the year 1793. many cases, in all probability, have happened; an inference may be drawn from thence that a doctrine prevailed, that when adverse possession was taken from the infant, limitations did not run on him until his full age, and that this doctrine is

*delivering the Opinion of the Court.) & Vide, to the same Point, Crozier vs. Gano & Ux. 1 Bibb's Rep. 261. Fewell & Ux. vs. Collins, 1 Constit. Rep. So. Car. 202. Den ex dem. Andrews vs. Mulford, 1 Hdw. Rep. 321,*

subsequent disability ensues ; the statute continuing to run, notwith-

"not impeached in the *dictum* of Lord Talbot, in *Belch & Harvey*, as it is not an adjudged case ; but on the contrary, there are adjudged cases where infancy, lawsuits and other circumstances, have excused the party, and where an infant being plaintiff, adverse possession was taken of him six years before he came of age, and that period being accounted for by infancy, although twelve years had elapsed after his coming of age before bill filed ; yet as it did not amount to twenty years, he had a right to bring his bill, and the party here being similarly circumstanced, being six years an Infant, and bringing his bill in time, if the six years be not accounted as part of the time. We do, therefore order and adjudge that the Decree of the Chancellor be reversed, and that the appellant have liberty to proceed before him on the bill, and that he hear the cause upon the merits, according to the course of that Court." & *Vide, Trustees of Lexington vs. Lindsay's Heirs*, 2 Marsh. Rep. (Ky.) 445. *Higginson, Survivor, &c. vs. Air & Al.* 1 Eq. Rep. (Dessauss.) 427.

The Limitation Act of 1814 [Kentucky] operates on conveyances made by non-residents to residents before the passage of the Act, so as to take away the ten years allowed by the act of 1796, to commence suit after return to the state. *Luckett vs. Dunn & Al.* 3 Litt. Rep. 218.

In the case of *Pancoast's Lessee vs. Addison*, (1 Har. & Johns. Rep. 350. 356.) it was Held, That a non-resident of the state, [Maryland] but who is a resident of one of the United States, is not barred by the Statute of Limitations in an action of Ejectment. And CHASE, Ch. J. said, "The Statute of Limitations with the savings is a beneficial law for the purpose of quieting possessions, &c. but without the savings it would be a rigorous and unjust law. It does not extend to persons out of the state, who cannot be supposed to know the law." & *Vide Brent's Lessee vs. Trasker*, 1 Harr. & M<sup>H</sup>en. Rep. 89.

The terms "beyond seas," in the proviso or saving clause of a Statute of Limitations, are equivalent to *without the Limits of the State* where the statute is enacted ; and the party who is without those limits is entitled to the benefit of the exception. *Murray's Lessee vs. Baker & Al.* 3 Wheat. Rep. 541. *Shelly & Al. Ex'ors. vs. Guy*, 11 Wheat. Rep. 361. *Pancoast's Lessee vs. Addison*, 1 Harr. & Johns. Rep. 350.

CONTRA, *Ward vs. Hollam*, 2 Dall. Rep. 217.

322. *Anon.* 1 Hayw. Rep. 416. *Fitzhugh vs. Anderson & Al.* 2 Hen. & Munf. Rep. 289. *Moore vs. White & Al.* 6 Johns. Ch. Rep. 372. *Dow vs. Warren*, 6 Mass. Rep. 328. *Hudson vs. Hudson's Admrs. & Al.* 6 Munf. Rep. 352. *Den ex dem. Pearce & Al. vs. House*, 3 Nor. Car. Law Repy. 305. *Lessee of Hall vs. Vandegrift*, 3 Binn. Rep. 374. *Faysouz vs. Prather*, 1 Nott & M<sup>C</sup>ord, Rep. 296. *Craddock's Lessee vs. Stalcup*, 1 Tenn. Rep. 363. *Walden vs. the Heirs of Gratz*, 1 Wheat. Rep. 296. *Lessee of Neilly vs. M<sup>C</sup>Cormick*, 2 Yeates' Rep. 448. *Cotterell vs. Dutton*, 4 Taunt. Rep. 830. *Wells vs. Newbolt, Cam. & Norw.* Rep. 407. *Rogers vs. Hillhouse*, 3 Conn. Rep. 398. *Adamson Admr. &c. vs. Smith*, 2 Rep. Const. Ct. So. Car. 289. *Langford's Admrs. vs. Gentry*, 4 Bibb's Rep. 468. *Doe ex dem. Priuchard & Al. vs. Lawyer*, 1 Hawk's Rep. 337. *Jones Admr. &c. vs. Brodie, Admr. &c.* 3 Murph. Rep. 594.

The same construction given to the Statute of Fines. *Goodright ex dem. Fowler & Al. vs. Forester & Al.* 1 Taunt. Rep. 578. 614.

standing the second disability.[3] It was once, indeed, endeavoured to distinguish between cases of voluntary and involuntary disability in this respect, and to maintain that an involuntary disability, as insanity, occurring after the statute had begun to run, would suspend its progress,[4]

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An estate devised to executors, or such of them as shall qualify, is a contingent executory devise, and does not vest until that event occurs; until then, the title descends to the heirs. And where, in such case, after the testator's death, but before the qualification of the executors, and whilst his heirs were infants, an entry was made on part of their land under a junior patent; it was *Held*, that the Statute of Limitations did not commence running, until the qualification of the executors, or one of them. *May's Heirs vs. Hill*, 5 *Litt. Rep.* 308.

"With regard to executory devises, whether certain or contingent, it is one of their properties that they cannot be aliened or barred by any mode of conveyance, whether by recovery, fine, or other act. Therefore executory devises preserve the estate from injuries, against the particular estate, and thus create a kind of perpetuity, on which courts have placed sundry restrictions. *May's Heirs vs. Hill*, 5 *Litt. Rep.* 312, 313. (Per *MILLS*, J. delivering the Opinion of the Court.)

[3] "It is an established rule, that when the Statute begins to run, it continues to run without interruption, from the death of the claimant." *Beauchamp, Admr. &c. vs. Mudd*, 2 *Bibb's Rep.* 538. (Per *BOYLE*, Ch. J. delivering the Opinion of the Court.) & *VIDE n* [2] *SUPRA*.

But under the Statute of Limitations of Kentucky, the saving whereof is in favour of those who were or shall be infants, &c. "at the time when the said right or title accrued or coming to them;" It was *Held*, That if the Statute begins to run against the ancestor, but by his death the land descends to his heirs, who are infants, the Statute does not run on, but the infants shall have the time allowed by the Statute after arriving at full age, to bring their action. *Machir, &c. vs. May, &c.* 4 *Bibb's Rep.* 44. & *Vide Floyd's Heirs vs. Johnson & Al.*, 2 *Litt. Rep.* 114. *May's Heirs vs. Bennet*, 4 *Litt. Rep.* 314. *M'Intire's Heirs vs. Funk's Heirs*, 5 *Litt. Rep.* 35.

The infancy of one tenant in common will not prevent the Statute of Limitations from running against a co-tenant. *Thomas vs. Machir, &c.* 4 *Bibb's Rep.* 412.

A party claiming the benefit of the proviso in the Statute of Limitations, can only avail himself of a disability existing when his right of action first accrued. *Jackson ex dem. Roosevelt & Al. vs. Wheat*. 18 *Johns. Rep.* 40. *Kendall vs. Slaughter*, 1 *Marsh. Rep. (Ky.)* 377.

[4] In the case of *Crozier vs. Gano & Ux.* (1 *Bibb's Rep.* 260,) *TAMBLE*, J. delivering the Opinion of the Court, said; "The evident design of the replication is to shew that the plaintiff, Keziah, from the time her cause of action first accrued, has at all times, (until within five years next before the commencement of the suit,) laboured under the disabilities of either infancy, coverture, or absence from the country, so as to bring her within the savings of the Statute of Limitations. If the replication had

but the argument was overruled, upon the principle that a different con-

"really shewn this, it would have been good: for although one of them, as infancy, for example, had been removed, yet if another of them occurred, as marriage, before the removal of that of infancy, and so on in succession, so that all were not removed at any one time, whereby the Statute could attach and begin to run, it would have been a sufficient answer to the plea: [*of the Statute of Limitations*,] this the replication has not done." & *Vide Eaton vs Sanford*. 2 *Day's Rep.* 523.

In the case of *Cotterell vs. Dutton*, (4 *Taunt. Rep.* 830.) CHAMBERE, J. said, "The ten years do not run at all while there is a continuance of disabilities, but they run without intermission from the time that the disabilities first cease."

But in the case of *Bunce & Al. vs. Wolcott*, (2 *Conn. Rep.* 27,) it was held, That the saving of the Statute of Limitations regarding the right of entry into lands, (*Tit.* 97, c. 3.) applies only to such disability as existed at the time the right of entry accrued, and not to any supervenient disability. & *Vide Thompson & Al. vs. Smith*, 7 *Serg. & R. Rep.* 209.

"It is equally well settled that cumulative disabilities cannot be allowed." *Jackson ex dem. Swartwout & Ux. vs. Johnson*, 5 *Cow. Rep.* 101. (Per SAVAGE, Ch. J.) & *Vide Opinions of SUTHERLAND, J. & WOODWORTH, J. to the same Point*, pages 95 & 105, (*same Case*.)

If a non-resident comes into the state temporarily, and returns to his dwelling without the state, the Statute of Limitations begins to run against him. *Doe ex dem. Smith vs. Harrow*, &c. 3 *Bibb's Rep.* 446. *Robertson, &c. vs. Smith's Heirs*, *Litt. Select Cas.* 296. *May's Heirs vs. Slaughter*, 3 *Marsh. Rep. (Ky.)* 505. 507. In this last cited case the Court said, (BOYLE, Ch. J. *delivering the Opinion*;) "We have no doubt, assuming the facts as true, that the Statute commenced running against John May in his life time. At the separation of this State from Virginia, we made the Statute of that State ours, by adoption, and in its turns [terms] it then applied to the limits of this state, which were the former limits of the district, and its expressions were retrospective, as to all previous as well as subsequent entries upon land, so that by the separation of the two States, the effect of the Statute did not cease. John May having been in the limits of the district, after the adverse entry and possession of the appellee, the Statute attached and took effect against him, altho' his residence was not within the district, as was decided by this Court in the case of *Smith vs. Hanon*. [*Harrow*,] 3 *Bibb*, 440." [446.]

Coparceners whose right of entry is barred by the Statute of Limitations, cannot recover in Ejectment by joining with them one whose right is saved; each, or any number being capable of vindicating his or their own right without joining the others. *Sanford & Ux. & Al. vs. Button*, 4 *Day's Rep.* 310.

An estate descending to a plurality of persons, under our [*Kentucky*] Act of Descents, is a joint estate, so far that in an Ejectment brought by parceners, if any one of them is out of the saving in the Act of Limitations, all will be. *Robertson, &c. vs. Smith's Heirs*, *Litt. Select Cas.* 296, 297.

Where the right of one tenant in common is protected by her coverture, the right of the other, who is under no disability, is not thereby saved.

struction had always been given to all the statutes of limitations, and that such nice distinctions would be productive of mischief.(g)

*Doolittle & Ux. vs. Blakesley*, 4 *Day's Rep.* 265. *Bryan & Al. vs. Hinman*, 5 *Day's Rep.* 211. *M'Intire's Heirs vs. Funk's Heirs*, 5 *Litt. Rep.* 34, 35.

If one of the persons against whom a decree is given, be an infant, his infancy will prevent the Statute of Limitations from barring those who must necessarily join with such infant in a Writ of Error to reverse such decree. *Kennedy's Heirs vs. Duncan*, &c. 1 *Hardin's Rep.* 365. & *Vide May's Heirs vs. Bennett*, 4 *Litt. Rep.* 314.

In the case of joint rights, all the complainants must labour under some legal disability, provided for by the Statute, to prevent the acts operating as a bar. *Smith, &c. vs. Carney & Al.*, 1 *Litt. Rep.* 297.

In a joint estate to several persons, if the right of entry is tolled as to some, all are barred; but it is otherwise if it be "an estate in severalty, or in common." *Dickey vs. Armstrong's Heirs*, 1 *Marsh. Rep. (Ky.)* 39, 40. *Robertson, &c. vs. Smith's Heirs*, *Litt. Select. Cas.* 296. *Robert's Heirs vs. Ridgeway*, *Ibid.* 394. & *Vide Turner & Al. Ex'ors. vs. Debell Ex'or.* 2 *Marsh. Rep. (Ky.)* 384. *Simpson & Al. vs. Shannon's Heirs*, 3 *Marsh. Rep. (Ky.)* 462. *Marsteller & Al. vs. McClean*, 7 *Cranch. Rep.* 156.

In the case of *Doe ex dem. Langdon & Al. vs. Rowleston*, (2 *Taunt. Rep.* 446.) *MANSFIELD*, Ch. J. delivering the Opinion of the Court, said, "In this case were two demises, and a verdict passed for the plaintiff on the second demise by *Elizabeth Langdon*, the fact being, that the estate descended to *Elizabeth Langdon*, a *Feme Covert*, and *Mary Peart*, in partenary, and that 20 years elapsed without *Mary Peart's* entering. And the only question was, whether the lessor of the plaintiff was not entitled to judgment on the first Count, on the idea that as *Elizabeth Langdon* was under a disability at the time of the descent cast, that circumstance was to operate in favour of the other coparcener. Upon the hearing of the argument, we were, and are now, of opinion, that the entry of *Elizabeth Langdon* cannot give a right of entry to *Barrett*, [he was the son and heir of *Mary Peart*, then deceased,] whose right was before barred by the Statute of Limitations; but that the judgment must be for the lessor of the plaintiff for the moiety only."

Under the act of Kentucky, of 1797, taken in connexion with preceding acts, declaring that entries for land shall become void, if not surveyed before the first day of October, 1798, with a proviso allowing to infants and *Femes Covert*, three years after their several disabilities are removed to complete surveys on their entries; it was *Held*, that if any one or more of the joint owners be under the disability of infancy or coverture, it brings the entry within the savings of the proviso as to all the other owners.—Distinction between this Statute and a Statute of Limitations of personal actions. *Shipp. & Al. vs. Miller's Heirs*, 2 *Wheat. Rep.* 317. *Kennedy & Al. vs. Bruce*, 2 *Bibb's Rep.* 371.

And where B., who owned a certificate of such entry, assigned his claim to H., an adult, and B. died within the time for surveying entries; *Held*, that neither B. nor his heirs being responsible for the title, after the assign-



It was said, by Lord Chancellor *Hardwicke*, that if a man, both of non-sane memory and out of the kingdom, come into the kingdom, and then go out of the kingdom, his non-sane memory continuing, his [ \*60 ] privilege, as to being out of the kingdom, is gone; and his privilege, as to non-sane memory, will begin from the time he returns to his senses.(h)

When the ancestor, to whom the right first accrues, dies under a disability, which suspends the operation of the statute, his heir must make his entry within ten years next after his ancestor's death, provided more than twenty years have elapsed from the time of the commencement of the ancestor's title, to the time of the expiration of the ten years. (i) [1]

(h) *Sturt v. Mellish*, 2 Atk. 610, 614.

(i) *Doe d. George v. Jesson*. 6 East. 80.

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ment, to H., the infancy of B.'s heirs did not save the entry from forfeiture for not being surveyed in time. *Hart's Heirs, &c. vs. Benton's Heirs, &c.* 3 *Bibb's Rep.* 420.

The 5th Section of the Limitation Act of 26th March, 1785, [*Pennsylvania*] is binding on infants where there has been no possession of lands improved for seven years next before action brought. *Lessee of Mobley & Al. vs. Ocker*, 3 *Yeates' Rep.* 200.

Neither the act of 1800 [*North Carolina*] repealing the laws granting escheated lands to the University, nor bringing a suit by the escheator under the act of 1801, suspends the Statute of Limitations as to the trustees whose right was sought to be divested by those acts. *Den ex dem. Trustees of the University vs. Campbell*, 1 *Murph. Rep.* 185.

[1] There is no saving in the Statute of Limitations, for any disability in the heir supervenient to the disability of the person to whom the right of entry first accrued. *Griswold vs. Butler & Ux.* 3 *Conn. Rep.* 227. (*Per BRISTOL, CHAPMAN & BRAINARD, Js. Contra, HOSMER, Ch. J. & PETERS, J.*)

Where an adverse possession has commenced in the lifetime of the ancestor, the operation of the Statute of Limitations is not prevented by the title descending to a person under legal disability, as a *Feme Covert, &c.* *Jackson ex dem. Livingston & Al. vs. Robins*, 15 *Johns. Rep.* 169.

Where an adverse possession begins to run in the lifetime of the ancestor, and the land descends to an infant heir, the latter is not protected by his disability. *Jackson ex dem. Colden & Al. vs. Moore*, 13 *Johns. Rep.* 513.

"We have not forgotten that it has been decided by this Court. that under our Statute, if a right of action accrues to one labouring under no disability, and by his death the right descends upon his heir, who does labour under some disability, the right of the latter will be saved until ten years after such disability is removed; but we have never decided that one disability can be added to another." &c. "When, therefore, a right of action has once accrued, or come to a person labouring under a disability, and that disability is removed, or the person so disabled has died, it is

It was once, indeed, contended that the meaning of this second section of the statute was to allow every person at least twenty years after their title accrued, if there were a continuing disability from the death of the ancestor last seised, and ten years more to the heir of a person dying under a disability, which ten years were in addition to the twenty years allowed by the first clause. But it was justly observed by the court, that if this construction obtained, there was no calculating how far the statute might be carried by parents and children dying under age, or continuing under other disabilities in succession; that the word *death*, in the second clause meant and referred to *the death of the person to whom the right first accrued*, and was probably introduced in order to obviate the difficulty which had arisen in the case of *Stowell v. Lord Zouch*, (j) upon the construction of the statute of fines, from the omission of that word; and, that the statute meant that the *heir* of every

(j) *Flow. 386.*

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"obvious, that the Statute has provided for no other or successive disability; and to permit such disability to cumulate and save the right, would be adding to the Statute, and giving to it an operation contrary to its import." *Floyd's Heirs vs. Johnson & Al.* 2 *Litt. Rep.* 114. (*Per CURIAM.*)

"There is no doubt, that a party has, in every event, twenty years to make an entry; and if under disability when the right or title of entry first accrued, then such person may, notwithstanding twenty years have expired, bring an action or make an entry, within ten years after the disability is removed." *Jackson ex dem. Corson & Al. vs. Cairns & Al.* 20 *Johns. Rep.* 306. (*Per SPENCER, Ch. J. delivering the Opinion of the Court.*) & *Vide Jackson ex dem. Swartwout & Ux. vs. Johnson*, 5 *Cow. Rep.* 94, 101, 105. *Demarest & Ux. vs. Wynkoop & Al.* 3 *Johns. Ch. Rep.* 137.

"It is perfectly well settled, that if several disabilities exist when the right of action accrues, the Statute does not begin to run, till the party has survived them all. (3 *Johns. Ch. Rep.* 138. 1 *Plowd.* 375.)" *Jackson ex dem. Swartwout & Ux. vs. Johnson*, 5 *Cow. Rep.* 101. (*Per SAVAGE, Ch. J.*) & *Vide Opinion of WOODWORTH, J. page 105, & Opinion of SUTHERLAND, J. page 94, (same Point.)*

"A person may be under several of the disabilities specified, at the time the title accrues; and in such case, the person so situated may avail him or herself of either; and it will always be a sufficient answer to an objection to such an election, to say, the disability on which I rely is pointed out by the proviso; it existed at the time my right or title accrued; I have prosecuted my claim within the time allowed after its discontinuance, and come within both the letter and spirit of the law." *Bunce & Al. vs. Wolcott*, 2 *Conn. Rep.* 34, (*Per EDMOND, J.*)

But in the case of *Pender vs. Jones*, (2 *Hayw. Rep.* 294.) TAYLOR, J. said, "I am of opinion, that if seven years be completed at a period of time, occurring after arrival at full age, when part of the seven years elapsed during infancy, that the party has three years from his arrival to age to make his entry or claim, and no more."

person, to which person a right of entry had accrued during [ \*61 ] any of the disabilities there stated, should have *ten \*years from the death of his ancestor*, to whom the right first accrued during the period of disability, and who died under such disability, notwithstanding the twenty years, from the first accruing of the title to the ancestor, should have before expired. (k)

Having thus discussed the general principles of the action, that a claimant in ejectment must have both the legal and possessory title, the particular persons, who, by reason of their estate and interest in the lands, are entitled to this action, must next be considered ;[1] remembering always, that a right of entry or possession is supposed to accompany their legal title.

#### 1. TENANT FOR YEARS[2]—FOR LIFE—IN TAIL[3]—OR IN FEE.

It has been said by a learned writer, that a tenant for years cannot before entry maintain an action of trespass, or *ejectment* ; because those acts complain of a violation of the possession, and therefore cannot be maintained by any person who has not had an actual possession ;(l) but this reasoning does not seem applicable to the modern principles of the remedy by ejectment. (m)

(k) *Doe d. George v. Jesson*, 6 East, 80.

(m) *Goodright, d. Hare, v. Cator*, Doug.

(l) 1 Cru. Dig. 248. *et vide* 4 Bac. Ab. 183.

477, 486.

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[1] If an action of Ejectment is entered for the use of any person, such person is substantially a party to the action. *Hammond vs Ridgely's Lessee*, 5 Harr. & Johns. Rep. 267.

“An action of ejectment, although in form a fiction, is in substance a “remedy pointed out to him who has a right to land, of which he is wrong-fully deprived; it is the title of the lessor, and not of the nominal lessee, that “is to be decided.” *Carroll & Al. Lessee vs. Norwood's heirs*, 5 Harr. & Johns. Rep. 173. (Per JOHNSON, J. delivering the Opinion of the Court.)

[2] Lessor, lessee, under-lessee : in a lease from lessee to under-lessee, it was provided, that if under-lessee were guilty of a breach of covenant, lessee and lessor might enter :

*Held*, that on a breach of covenant in the lease to under-lessee, ejectment might be maintained by lessee alone. *Doe d. Bedford & Al. vs. White*, 4 Bingh. Rep. 276.

[3] The widow of an intestate cannot join with the heirs in bringing ejectment for the lands of the deceased. *Pringle & Al. vs. Gaw*, 5 Serg. & R. Rep. 536.

If she join with the heirs in the Ejectment, the heirs cannot recover judgment alone. *Ibid*.

## \*2. MORTGAGEE. [1]

[ \* 62 ]

When a person is in possession, under a lease granted by the mortgagor prior to the mortgage, the mortgagee will be bound by it; (n) but if the lease be made subsequently to the mortgage, without the privity of the mortgagee, it will be no defence to an ejectment brought by the mortgagee; because the mortgagor has no power to let leases not subject to every circumstance of the mortgage. (o) The principle extends also to cases where the party in possession is tenant from year to year to the mortgagor. (p)

If the mortgagee assign the mortgage, and the assignee assign to another, the last assignee may maintain ejectment for the mortgaged premises. (q)

If there be two several mortgagees of the same lands, the mortgagee who has the legal estate will be entitled to recover in an ejectment against the other mortgagee, although his mortgage be posterior in point of time. As, where a term had been created to attend the inheritance,

(n) *Doe, d. Da Costa, v. Wharton*, 8 T. R. 2

(p) *Thunder, d. Weaver, v. Belcher*, 3 East, 449.

(o) *Keech, d. Warne, v. Hall*, Doug. 21.

(q) *Smartle v. Williams*, Salk. 245.

[1] In Ejectment by mortgagee against mortgagor, it is not necessary to demand possession before action brought. Where the mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, the latter is not tenant at will to the former, but at most tenant by sufferance only; and may be treated either as tenant or trespasser at the election of the mortgagee. *Doe ex dem. Roby vs. Maisey*, 8 Barnew. & Cress. Rep. 767.

In an Action of Ejectment brought upon a mortgage, the Court will not allow the money due upon the mortgage to be paid into Court, if there is a bill in equity pending on the mortgage. *Den ex dem. Smith vs. Fen & Al. 4 Halsted's Rep.* 335.

Ejectment will not lie by a mortgagor against a mortgagee in possession, even after the money has been tendered. *Hill vs. Payson & Al.*, 3 Mass. Term Rep. 569.

One setting up and claiming under a mortgage admits the mortgagor's title at the execution of the mortgage; and proving the mortgage to be usurious, shews that such title was not affected by it. *Jackson ex dem. Hills vs. Tuttle*, 9 Cowen's Rep. 233.

But the "Revised Statutes" of New-York, Part 3, Chap. 5. Tit. 1. § 57. (Vol. 2. p. 312.) contain the following Enactment:

"§ 57. No action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises."

and the lands were afterwards mortgaged to *A.*, who took no assignment of the term, but had possession of the other title-deeds, and the same lands were subsequently mortgaged to *B.*, who took an assignment of the term, it was held that *B.* might recover the possession against *A.*(*r*)

[ \*63 ]      \*3. LORD OF A MANOR.

When the tenant of copyhold premises has committed an  
[ \*64 ] act by which he forfeits his lands, he who is lord at the time \*of the forfeiture committed, may maintain an ejectment for the recovery of them; but this right is confined to the lord for the time being, unless the act of forfeiture destroys the estate, and then the heir of the lord, in whose time it was committed, may also take advantage of it.(*s*)

Where, however, a copyholder, holding of a manor belonging to a bishopric, committed a forfeiture by felling timber during the vacancy of the see, the succeeding bishop was allowed to maintain an ejectment against him.(*t*)

The right of the lord to maintain ejectment against his copyholder, for a forfeiture by committing waste, will not be taken away by an intermediate estate in remainder, between the life estate of the copyholder and the lord's reversion; for if it were, the tenant for life, and remainderman, by combining together, might strip the inheritance of all the timber.(*u*)

\*When an inclosure has been made from the waste for 12 or  
[ \*65 ] 13 years, and seen by the steward of the same lord, from time to time, without objection made, it may be presumed by the jury to have been made by the license of the lord, and an ejectment cannot be maintained by him against the tenant, without a previous notice to throw it up.(*v*)

It has never been expressly decided whether the statute of limitations will run against the lord, in case of a forfeiture by a copyholder, and bar his taking advantage of it after a lapse of twenty years; but, from the language of Lord *Kenyon*, C. J. in the case of *Doe*, d. *Tarrant*, v. *Hel-*

(*r*) *Goodtitle*, d. *Norris*, v. *Morgan*, 1 T. R. 755.

(*s*) *Wat. Copy*. Vol. 1. 324 to 353. *Doe*, d. *Tarrant*, v. *Helier*, 3 T. R. 162.

(*t*) B. N. P. 107.

(*u*) *Doe*, d. *Folkes*, v. *Clements*, 2 Maul. and Sel. 68.

(*v*) *Doe* d. *Foley* v. *Wilson*, 11 East, 56.

lier, it seems that its provisions would be applicable to this as well as to all other rights of entry.(w)

#### 4. COPYHOLDER.

Whilst the ancient practice of the action of ejectment prevailed, it seems to have been holden, that a copyholder could not maintain an ejectment, upon a demise for a longer term than a year, unless the license of the lord were first obtained, or a special custom existed in the manor enabling him to make longer leases; and, in some authorities, it is even doubted, whether an ejectment can in any case be supported by a copyholder.(x) But, since the introduction of the modern practice, these objections are wholly obviated, and the common consent rule is now sufficient to enable a copyholder to maintain ejectment.

\*As the surrender(y) and admittance to copyhold lands [ \*66 ] make but one conveyance,(z) the legal title does not vest in the surrenderee until after admittance: but, when the admittance has been made, the title relates back to the time of the surrender, against all persons but the lord; and, therefore, a surrenderee may recover in ejectment against his surrenderor, or a stranger, upon a demise laid between the times of admittance and surrender, provided the admittance be made before the time of the trial.(a)

*Ashurst*, J. in delivering the judgment of the Court in this case, was of opinion that the surrenderee might maintain ejectment against his surrenderor on such a demise, although not admitted before the trial, because the surrenderor is but a trustee to his surrenderee; but it should

(w) 3 T. R. 162—172.

(z) *Stephens, v. Elliot*, Cro. Eliz. 483. *Goodwin v. Longhurst*, Cro. Eliz. 535. *Sparks' case*, Cro. Eliz. 676. *Downingham's case*, Owen, 17. *Eastcourt v. Weeks*, 1 Lut. 798—808.

(y) In the case of *Dee d Warry, v. Miller*, (1 T. R. 398.) it was endeavoured to assimilate to copyhold principles, the practice of the Society of New Inn, in granting out their chambers for lives. It is customary with that society in such grants, to insert a clause, that the tenant shall not sell or assign, without the license of the society, and for the grantees when they wish to transfer their interest, to surrender the chambers (upon a proper deed stamp) to the Treasurer and An-

cients, to the intent that they shall grant the said chambers to the transferee; which subsequent grant was never in point of fact made, but simply an entry of admittance inserted in the Society's books. It is, therefore, evident, that, after the first surrender, the legal estate, always remains in the Treasurer and Ancients, as trustees for the subsequent transferees respectively, and that the terms *surrender* and *admittance* bear not the slightest resemblance in their meaning, to the surrender, and admittance to copyhold premises.

(z) *Roe, d. Jeffreys, v. Hicks*, 2 Wils. 13. 15.

(a) *Holdfast, d. Woollams, v. Clapham*, 1 T. R. 600. *Dee, d. Bennington v. Hall*, 15 East, 208.

seem, since the legal estate remains in the surrenderor until the time of admittance, that this doctrine is not applicable to the present principles of the action.(b)

[ \*67 ] \*The heir to copyhold lands may, however, maintain ejectment before admittance against a stranger who obtains possession of the land ;(c) for his title is complete against all the world, except the lord, immediately upon the death of the ancestor.(d) But if the lord seize the land, upon the ancestor so dying, and the heir bring an ejectment against him for the seizure, it will be necessary to shew that he has tendered himself to be admitted at the lord's court, or that the lord has dispensed with such tender.(e)

Where the devisee of a customary estate, which had been surrendered to the use of the will, died before admittance, it was holden that her devisee, though afterwards admitted, could not recover in ejectment ; for the admittance of the second devisee had no relation to the last legal surrender, and the legal title remained in the heir of the last surrenderor.(f)

#### 5. LESSEE OF A COPYHOLDER.[1]

If a copyholder, without license, make a lease for one year, or with license, make a lease for many years, and the lessee be ejected, he shall not sue in the lord's court, by plaint, but shall have an ejectment at the common law ; because he has not a customary estate by copy, but a warrantable estate by the rules of common law.(g)

#### 6. WIDOW FOR HER FREE-BENCH.

[ \*68 ] \*When there is a custom in a manor, that the widow shall enjoy, during her widowhood, the whole, or part of the cus-

(b) *Doe, d. Da Costa, v. Wharton*, 8 T. R. 2. B. N. P. 109.

(c) *Roe, d. Jeffreys, v. Hicks*, 2 Wils. 28.

(d) *Rex v. Rennett*, 2 T. R. 197.

(e) *Doe, d. Burrell v. Bellamy*, 2 Maul. and Sel. 87.

(f) *Doe, d. Vernon, v. Vernon*, 7 East, 8.

(g) *Co. Copy. s. 5. Goodwin v. Longhurst*, Cro. Eliz. 535.

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[1] Copyhold lands were granted to A. for the lives of herself and B., and in reversion to C. for other lives. A. died having devised to B., who entered and kept possession for more than twenty years. On his death C. brought ejectment: *Held*, that the action was barred by the Statute of Limitations, for that C's. right of possession accrued on the death of A., inasmuch as there cannot be a general occupant of copyhold land. *Doe ex dem. Foster & Al. vs. Scott, 4 Barnew. & Cress. Rep. 706.*

tomary lands, wherewith her husband died seised, as of free-bench, she may, after challenging her right, and praying to be admitted,<sup>(h)</sup> maintain ejectment for them without admittance, even against the lord ; because it is an excrescence, which, by the custom and the law, grows out of the estate.<sup>(i)</sup>

But if the widow's claim be in the nature of dower,[1] an ejectment

(h) *Doe, d. Burrell, v. Bellamy*, 2 Maul. and Sel. 87.

(i) *Jordan v. Stone*, Hutt. 18. *Howard, v. Bartlett*, Hob. 181.

[1] In Ejectment for dower, admeasured on application to the Surrogate, under the act (1 R. L. 60, 1, 2.) the proceedings are no evidence of title, nor of any thing more than that *the part assigned belongs to the Widow*, after a title is shewn. "This is like any other ejectment suit. "The Plaintiff must make out his title ; and the Defendant is at liberty to "impeach it." *Jackson ex dem. Clarke vs. Randall*, 5 Cowen's Rep. 168, 170. *Jackson ex dem. Sitzer vs. Waltermire*, *Ibid.* 299. *Matter of Watkins, Widow*, 9 Johns. Rep. 245. & *Vide*, *Matter of Gardiner vs. Spike-man*, 10 Johns. Rep. 368.

"Until the admeasurement is reversed, it must be conclusive, in an action of ejectment, as to the part belonging to the Widow. *Jackson ex dem. Miller vs. Hizon*, 17 Johns. Rep. 123, 126.

The same evidence of seisin which would entitle the heir to recover in Ejectment, will maintain an action for Dower. *Jackson ex dem Sitzer vs. Waltermire*, 5 Cowen's Rep. 299.

The proceedings to set off or assign dower by the Court of Common Pleas, under the Act (1 R. L. 60) are merely evidence of the location of the land to be recovered. All the other facts, as seisin of the husband, &c. must be proved in the ordinary way, as in an action of dower. *Ibid.*

Actual possession of the husband, or the receipt of rent by him, is, *prima facie*, evidence of seisin, in an action for dower. *Ibid.*

Where it appeared by parol, that the husband bought a farm, paying something towards it, taking possession and selling to another, who succeeded him in the possession ; and so through several tenants down to the Defendant, who was in possession ; *Held*, that this was, *prima facie*, evidence of the husband's seisin ; and sufficient to entitle his Widow to recover dower ; though no deeds were shewn. *Ibid.*

Ejectment does not lie for dower which has not been assigned. *Doe ex dem. Nutt vs. Nutt*, 2 Carr. & P. Rep. 430.

But by the "Revised Statutes" of New-York, Ejectment will lie for Dower before Assignment or Admeasurement. *Vide* Part 3, Chap. 5, Tit. 1. §§ 1, 10, 55 & 56. (*Vol. 2, pp. 303, 304, 311 & 312.*) The manner in which Dower is to be assigned, after Ejectment brought, is prescribed in the following sections : (*Vol. 2, pp. 311, 312.*)

"§ 55. If the action be brought to recover the dower of any widow, "which shall not have been admeasured to her before the commencement "of such action, instead of a writ of possession being issued, such plaintiff "shall proceed to have her dower assigned to her in manner following :



will not lie before assignment,(j) but she must levy a plaint in the nature of a writ of dower, in the lord's court.

7. GUARDIAN IN SOCAGE,(k) OR TESTAMENTARY GUARDIAN, appointed pursuant to the statute 12 Car. II. c. 24. s. 8.(l)

But a guardian for nurture cannot maintain ejectment, for he cannot make leases for years, either in his own name, or in the name of the infant; because he has only the care of the person, and education of the infant, and has nothing to do with the lands merely in virtue of his office.(m)

[ \*69 ]      \*8. INFANT.(n)

It is difficult to discover any principle upon which both infant and guardian can have the power of maintaining ejectment for the same lands, unless, indeed, the power of the infant be limited to those cases, in which no testamentary guardian has been appointed, and the infant is either above the age of fourteen years, or, being under that age, has had no person to take upon himself the office of guardian in socage. No case, certainly, can be found, in which this distinction has been taken,

(j) *Chapman v. Sharpe*, 2 Show 184.

(k) Litt. Sec. 123, 124. *Wade v. Cole*,  
Ld. Raym. 130.

(l) *Bedell v. Constable*, Vaugh. 177. *Doe*,  
d. *Parry*, v. *Hodgson*, 2 Wils. 129.

(m) *Ratcliffe's case* 3 Co. 37.

(n) *Rudston v. Yates*, March. 141. *Zouch*,  
v. *Parsons*, Burr. 1784. 1808. *Noke v. Wind-*  
*ham*, Stran. 684. *Maddon, d. Baker*, v.  
*White*, 2 T. R. 159.

" 1. Upon the filing of the record of judgment, the court, upon the motion of the plaintiff, shall appoint three reputable and disinterested freeholders, commissioners, for the purpose of making admeasurement of the dower of the plaintiff, out of the lands described in the record; and the commissioners so appointed, shall proceed in like manner, possess the like powers and be subject to the like obligations and control, as commissioners appointed pursuant to the seventh Title of the eighth Chapter of this act:

" 2. The report of the commissioners may be appealed from by any party to the action, within the same time, and the like proceedings shall be had thereupon, as are prescribed in the said seventh Title of the said eighth Chapter:

" 3. Upon the confirmation of the report of the commissioners, a writ of possession shall be issued to the sheriff of the proper county, describing the premises assigned for the dower, and commanding the sheriff to put the defendant in possession thereof.

" § 56. The costs and expenses incurred in such admeasurement of dower, shall be subject to the provisions contained in the seventh Title of the eighth Chapter of this act."

but it is not inconsistent with the doctrine respecting guardians in socage, and accords most fully with the established principles of the action of ejectment.

#### 9. ASSIGNEE OF A BANKRUPT. (o' [1]

As all the bankrupt's property real and personal, is vested in the assignees by the statute 13 Eliz. c. 7. s. 1, 2. it follows, of course, that they must be invested with all power necessary to obtain possession of it; and the general assignment gives them a title to all the leaseholds (except for lives) belonging to the bankrupt, whether the same be in his possession at the time of the bankruptcy, or acquired by him afterwards. But with respect to the freehold lands of the bankrupt, they do not pass by such assignment, but must, by the provisions of the statute of Elizabeth, be conveyed by the commissioners by deed indented and enrolled; and until the enrolment, as well as the bargain and sale, is completed, the assignees cannot maintain ejectment. The bargain [ \*70 ] and sale, also, only affects the lands to which the bankrupt is entitled at the time of its execution: if he acquire any future real estates, there must be a new bargain and sale to vest the legal estate in the assignees. (p)

#### 10. CONUSEE OF A STATUTE-MERCHANT OR STAPLE, (q)

(o) *Beck, d. Hawkins, v. Welsh*, 1 Wils. N P 431:  
276.

(q) *Co. Litt. 42. a. Hammond v. Wood*

(p) *Ex parte Proudfoot*, 1 Atk. 262. Esp. Salk. 563.

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[1] The provisional assignee of the insolvent debtors Court may maintain Ejectment for the property of an insolvent, under the provisions of the 1st Geo. 4. c. 119. and the 3d Geo. 4, c. 123. *Doe ex dem. Clark & Al. vs. Spencer*, 2 Carr. & P. Rep. 79.

A. who claims to hold lands under B. as a security for a debt, cannot defend an ejectment against the assignees of B. after his bankruptcy, on the ground that the grant under which B. derives his title from the crown is void. *Doe dem. Biddle vs. Abrahams*, 1 Starkie's Rep. 305.

Although the assignment of an insolvent debtor passes the legal estate in his lands, yet a trust results by operation of law, which as soon as the debts are satisfied, entitles him to the possession against his assignees, *et a multo fortiori*, against a stranger, against whom he may maintain an ejectment in his own name; and in the absence of proof to the contrary, this Court will intend that he produced satisfactory evidence, that the debts were paid; particularly after a lapse of fourteen years. *Ross vs. M'Junkin*, 12 Serg. & R. Rep. 364.

## 11. TENANT BY ELEGIT.[1]

It is laid down in the case of *Louthal v. Tomkins*,<sup>(r)</sup> that if a tenant by *elegit* desire to obtain *actual* possession of the lands, he must bring an ejectment; for the sheriff, under the writ, delivers only the *legal* possession; which doctrine is recognized by Lord *Kenyon*, C. J., in the case of *Taylor v. Cole*;<sup>(s)</sup> but in the case of *Rogers v. Pitcher*,<sup>(t)</sup> it is

<sup>(r)</sup> 2 Eq. Ca. Ab. 280.<sup>(t)</sup> 6 Taunt. 202.<sup>(s)</sup> 3 T. R. 295.

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[1] In order to make out a title to lands by the levy of an execution, it must be shown that the appraisers were indifferent freeholders, and that they were shewn according to law. *Tweedy & Al. vs. Pickett*, 1 *Day's Cases*, 109.

To recover in ejectment under a purchase at sheriff's sale, on a judgment against a party not in possession, the plaintiff must prove against the one found in possession, that the party against whom the judgment was rendered, had some right, title, or interest in the premises sold. And it was held not enough to show that such party held adversely for less than twenty years, but abandoned the premises before judgment, to which she never returned; though a few months after abandoning, she conveyed to the defendant in the Ejectment who afterwards entered under the conveyance. *Jackson ex dem. Stewart vs. Town*, 4 *Cowen's Rep.* 599.

An equitable or legal seisin must be shown, on which a judgment can attach, and be a lien, in order to warrant a sale of real estate under it. *Ibid.*

Where the party against whom the judgment is recovered, is the actual possessor; this is sufficient of itself; for actual possession is *prima facie* evidence of title; and he cannot show title in another. *Ibid.*

If one convey, before judgment against him, the land conveyed cannot be sold under the judgment; and the law will intend such conveyance to be *bona fide*, and for valuable consideration, till the contrary is shown. *Ibid.*

In making out a title under a Sheriff's deed, it appeared that the debtor in the execution was in the possession several years before it issued, and before the judgment; and that the Defendant in Ejectment held under him as tenant. *Held*, that the defendant was estopped to show title out of the debtor. *Jackson ex dem. Witherell & Al. vs. Jones*, 9 *Cowen's Rep.* 182.

When the plaintiff in ejectment made title under a purchase upon execution, against the tenant of the judgment debtor, (the tenant being defendant in ejectment,) and shewed by parol that the defendant confessed he held under the debtor by lease; and the defendant gave evidence that it was a written lease, and then objected that the plaintiff should produce the lease, or shew notice to produce it; *Held*, that the production of the lease lay with the defendant; and he omitting to produce it, or give legal proof of it, the lease should be taken to have expired or not to be a subsisting lease, so as to prevent the plaintiff's recovery. *Ibid.*

said by *Gibbs*, C. J. "I am aware that it has, in several places, been said, that the tenant in *elegit* cannot obtain possession without an ejectment, but I have always been of a different opinion. There is no case in which a party may maintain ejectment, in which he cannot enter. The ejectment supposes that he has entered; and that the lessor may do it by another, and not enter himself is not very intelligible. I would not, however, consider the present case as now deciding these points, which I only throw out in answer to the argument that has been used." (t)

\*When a tenant in possession claimed under a lease granted prior to the date of the judgment against his lessor, [ \*71 ]  
 \*it was held that the tenant by *elegit* could not recover in ejectment because the lessee's title being prior in point of time, the legal estate was in him. (u) [ \*72 ]

## 12. PERSONAL REPRESENTATIVE. (v)

This right is, of course, confined to those lands which the testator, or intestate, held for a term of years; but it is immaterial, whether the ouster be after, or before the death of the testator, or intestate. (w)

Personal representatives may recover in ejectment under the statute 29 Car. II. c. 3. s. 12., appropriating estates \*held *pur* [ \*73 ]  
*autre vie*, where there is no special occupant. But this statute does not extend to copyholds, and, therefore, one who was admitted tenant upon a claim as administrator *de bonis non* to the grantee of a copyhold *pur autre vie*, was not permitted to maintain ejectment. (x)

## 13. DEVISEE. [1]

(t) 6 Taunt. 202.

(u) *Doe d. Da Costa v. Wharton*, 8 T. R. 2.

(v) 4 Edw. III. c. 7.

(w) *Slade's case*, 4 Co. 92, 95 (a) *Doe d.*

*Shore v. Porter*, 3 T. R. 18.

(x) *Zouch, d. Forse v. Forse* 7 East, 186.

[1] It is not necessary that an Executor of a will, made in *Virginia*, devising to him land in *Kentucky*, should take out letters testamentary in *Kentucky*, to enable him to maintain Ejectment for such land. *Doe ex dem. Lewis & Ur. vs. M'Farland & Al.*, 9 Cranch, *Rep.* 151.

Devise of real estate to four persons named in the will as executors, to rent the same and distribute the profits among the testator's wife and children. Afterwards three of the executors refused the trust; one of them died: the other two renounced by an instrument in writing after the commencement of the suit; but were examined as witnesses and declared, they had from first refused the trust. *Held*, that the other executor alone might recover in Ejectment. *Jones vs. Maffett & Ur.*, 5 Serg. & R. *Rep.* 523.

Where the devise is of a freehold interest, the devisee may immediately, and without any possession, maintain ejectment for the lands devised; (y) but if it be a legacy of a term of years, he must first obtain the assent of the executors to the bequest. (z) When, however, such assent is obtained, the legal estate vests absolutely in the legatee, and he may maintain ejectment against the executor, as well as against a stranger. (a)

14. GRANTEE OF A RENT-CHARGE, having power to enter upon the lands, if the rent be in arrear, and hold them until satisfaction. (b) [2]

[ \*74 ] \*These rights of entry are always taken strictly; and, where a man gave a leasehold estate by will to *B.*, his executors, &c. subject to a rent-charge to his wife during her widowhood, with a power to the widow to enter for non-payment of rent, and to enjoy, &c. until the arrears were satisfied, and in case of the widow's marriage, he willed that *B.* should pay the rent-charge to *C.*, his executors, administrators, and assigns, it was holden that *C.*'s executors, after the widow's marriage, and *C.*'s subsequent death, had no right of entry for non-payment of the rent charge. (c)

(y) Co. Litt. 240 (b)

(b) *Jenot v. Cowley*, 1 Saund 112.

(z) *Young v. Holmes*, Stran. 70.

(c) *Russell d. Hodson v. Gouthwaite*, Wil-

(a) *Doe d. Lord Say and Sele v. Guy*, 3

lis, 500.

East, 120.

Where the devisee of an estate refused to take it, saying she was entitled as heir at law, and would not accept any benefit by the will of the deviser: *Held*, that this was not such a disclaimer as prevented her from afterwards bringing Ejectment and relying on her title as devisee.

*Quere*, whether a devise of an estate can be waived by parol? *Doe dem. Smyth vs. Smyth*, 6 *Barnew. & Cress. Rep.* 112.

A devisee in fee may, by deed, without matter of record, disclaim, the estate devised. *Townson vs. Tickell & Al.*, 3 *Barnew. & Ald. Rep.* 31.

[2] The payment of a lien, or a charge on land, may be enforced by Ejectment. *Galbraith & Al. vs. Fenton*, 3 *Serg. & R. Rep.* 359.

Ejectment will lie under a mortgage on non-payment of money, though the act of Assembly gives a different mode of proceeding. *Lessee of Smith & Al. vs. Buchanan*, (cited,) 1 *Yeates, Rep.* 13.

But it seems Ejectment is not the proper form of action to recover a legacy charged on land. *Gause vs. Wiley*, 4 *Serg. & R. Rep.* 509.

Before the grantee of a rent charge can enter for the non-payment of rent, he must make a demand of the precise amount due on the day on which it became due, and on the most notorious part of the land: although the possession be vacant and there be nothing to distrain. *M<sup>r</sup> Cormick vs. Connell*, 6 *Serg. & R. Rep.* 151.

**15. ASSIGNEE OF THE REVERSION, upon a Right of Re-entry for condition broken. (d)**

By the common law, no one could take advantage of a condition, or covenant, but the immediate grantor, or his heirs, a principle consistent with the old feudal maxims, but highly injurious to the rights of grantors, when the practice of alienating estates became general, and leases for years a valuable possession. To remedy this evil, it is enacted by the 32 Hen. VIII. c. 34. that the grantees, or assignee of a reversion shall have the same rights and advantages, with respect to the forfeitures of estates, as the heirs of individuals, and the successors of corporations, had until that time solely enjoyed; and this statute is made most general in its operation, by particularly including the grants from the Monarch of those lands, which had then recently become the property of the Crown by the dissolution of the monasteries.

The words of the statute grant the privilege of re-entry \*to the assignees "for non-payment of rent, or for doing waste, [ \*75 ] or for other forfeiture;" but these latter words have been limited in their interpretation to "*other forfeiture of the same nature*," and extend to the breach of such conditions only, as are incident to the reversion, or for the benefit of the estate. Thus, the assignee may take advantage of covenants for keeping houses in repair, for making of fences, scouring of ditches, preserving of woods, or such like, (e) but not of collateral covenants, as for the payment of a sum in gross, or for the delivery of corn, or wood; and it has upon this principle been doubted, whether the assignee can re-enter, if the lessee break a covenant not to assign without license. (f)

The assignee of part of the reversion in all the lands demised, is an assignee within this statute, but the assignee of the reversion in part of the lands is not; for the condition being entire, cannot be apportioned by the act of the parties, but shall be destroyed. If, therefore, A. be lessee for years of three acres, with condition of re-entry, and the reversion of all the *three acres* be granted to B. *for life, or for years*, B. can take advantage of the breach of the condition; but if a reversion of any nature whatsoever, even in *fee*, of *two acres* only, be granted to B., he cannot. (g)

(d) 32 Hen. VIII. c. 34.

(e) Co. Litt. 215, (b).

(f) *Lucas v. How*, Sir T. Ray, 250.

(g) Co. Litt. 215, (c).

A *cestui que use*, and bargainee of the reversion, are within this statute, because they are assignees by act of the party; but it does not extend to persons coming in by act of the law, as the lord by escheat; (h) nor to an assignee \*by estoppel only; (i) nor to one who is in of another's estate; and, therefore, if the reversion, expectant on the determination of the term, be merged in the reversion in fee, the reversion is no longer within the statute. (j)

This statute is held not to extend to gifts in tail, (k) but copyhold lands, are within its intention and equity. (l)

#### 16. ONE HAVING HAD AN ADVERSE POSSESSION FOR TWENTY YEARS.

An adverse possession for twenty years is not only an available defence to the party, whilst he continues in possession, but it gives him (unless affected by some of the exceptive provisions in the statute of limitations(m)) a complete possessory right to the lands, and is a sufficient title to enable him to maintain an ejectment, against any person who ousts him after the expiration of the twenty years. (n) [1]

(h) Co. Litt. 215, (a).

(i) *Auder v. Nokes*, Moore, 419.

(j) *Threr v. Barton*, Moore, 94. *Chaworth v. Philips*, Moore, 876. *Webb v. Russell*, 3 T. R. 393. 401.

(k) Co. Litt. 215, (a)

(l) *Glover v. Cope*. Carth. 205.

(m) Ante, 46.

(n) *Sloker v. Barney*, Ld. Raym. 741.

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[1] Though a prior possession is good ground of recovery in Ejectment against one who claims by mere possession; yet if such previous possession were not continued, but voluntarily abandoned, it becomes unavailing against the subsequent possession. *Jackson ex dem. Livingston vs. Walker*, 7 Cowen's Rep. 637

And although such previous possession be not voluntarily abandoned, yet it will not avail against a subsequent possession acquired by a recovery and execution in Ejectment. *Ibid.*

A naked possession is a good title to recover in Ejectment against one who put the plaintiff out of possession, and can show no better title, but not against one who shows a better title. *Woods & Al. Ex'rs vs. Lane & Al.*, 2 Serg. & R. Rep. 53.

If, in an Ejectment, it be proved that the lessor of the plaintiff let the *locus in quo* to a tenant, who held peaceable possession for about a year: this is sufficient evidence of title as against a party who came in the night and forcibly turned such tenant out of possession. *Doe dem. Hughes vs. Dyball*, 3 Carr. & P's Rep. 608.

A prior possession is *prima facie* evidence of title in an action of Ejectment; but where a recovery by Ejectment is had against a prior possessor, he cannot set up his possession as the foundation of a recovery in a cross Ejectment, unless it were of sufficient length to be evidence of title;

\*It seems, also, from a recent decision, that this doctrine [\*77]

as where it was for twenty years and more. *Jackson ex dem. Williams & Al. vs. Miller*, 6 Cowen's Rep. 751.

In Ejectment a prior possession short of twenty years, under a claim of right, will prevail over a subsequent possession short of twenty Years, where no other evidence appears on either side; but it must appear that the prior possession of the Plaintiff had not been voluntarily relinquished, without the *animus revertendi*; and that the subsequent possession of the Defendant was acquired by mere entry, without any lawful right. *Jackson ex dem. Murray & Al. vs. Denn*, 5 Cowen's Rep. 200. *Smith ex dem. Teller vs. Lorillard*, 10 Johns. Rep. 338, 356. *Jackson ex dem. Klock & Al. vs. Richtmyre*, (IN ERROR) 16 Johns. Rep. 314, 325. *Jackson ex dem. Murray & Al. vs. Hazen*, 2 Johns. Rep. 22. *Jackson ex dem. Duncan & Al. vs. Harder*, 4 Johns. Rep. 202. & Vide *Jackson ex dem. Ludlow & Al. vs. Myers*, 3 Johns. Rep. 397.

But where the Lessors of the Plaintiff had a prior possession for seven years, and were then ousted by Writs of *Habere facias Possessionem*, issued on a Judgment by default which were the foundation of the Defendant's claim, and who had "nothing to set up but a subsequent possession of "eighteen years acquired thereby"; KENT. Ch. *delivering the Opinion of the Court of Errors*, said, "It was held in *Smith vs. Lorillard*, (10 Johns. Rep. 338.) that a prior possession under a claim of right, and not voluntarily abandoned, would prevail over a subsequent possession of less than "twenty years. But the rule was laid down with the qualification, that no "other evidence of title appeared on either side, and that the subsequent "possession of the defendant was acquired by *mere entry without any lawful right*. But in the case before us, the possession set up by the defendant was acquired under the authority of a Judgment at law and was "consequently a lawful entry. A possession with such a circumstance attached to it, affords a better presumption of right than the preceding possession, which had been overcome and lost by the action at Law, and "consequently, the presumption which would naturally attach to the prior possession, is here shifted from the prior to the subsequent possession. "We are not now to inquire how the Judgment at law happened to be obtained, the intendment is, that it was regularly and lawfully obtained, "either from the want of title or want of attention in the opposite party, "and if he had any equitable ground for relief against the Judgment, the "Supreme Court would have afforded him that relief, if he had applied in "due season. But it seems the Judgment in the Ejectment suit was acquiesced in for eighteen years, and it is perfectly right and reasonable, "that the party who now seeks to regain his possession, should be put to "show something more than a mere naked possession existing prior to such "Judgment. The presumption founded on that possession perished with "the loss of that possession by the Judgment and execution at law." *Jackson ex dem. Klock & Al. vs. Richtmyre*, 16 Johns. Rep. 314, 325. (IN ERROR.)

And when the Plaintiff in Ejectment claims to recover on the ground of prior possession, that possession must be clearly and unequivocally proved. The payment of taxes, and the execution of partition deeds, are not evidence of an actual possession, though they may shew a claim of title. *Jackson ex dem. Ludlow & Al. vs. Myers*, 3 Johns. Rep. 393.



holds between the party having had the adverse possession [ \*78 ] \*for twenty years, and the legal owner of the lands, although the party having had the possession afterwards desert the premises, and the right owner peaceably enter thereon.(o )

(o) *Doe, d. Burrough, v. Reade, 8 East, 253.*

An undisturbed possession of thirty-eight years, of premises which, by a recent survey, appear to have been originally improperly located, is conclusive evidence of title. *Jackson ex dem. Wright & Al. vs. Dieffendorf, 3 Johns. Rep. 269.*

Where the lessor had, thirty-five years before the defendant came into possession of the part which he claimed, exercised acts of ownership with respect to parts of a tract of land, and asserted his right to the whole which was admitted by all the settlers on the tract, until many years after the entry of the defendant, it is to be inferred, that the defendant came in under the lessor, and a grant from the original patentees to the lessor must be presumed. *Jackson ex dem. Gansevoort & Al. vs. Lunn. 3 Johns. Cas. 109.*

Possession in the lessor without claiming title, will not maintain the action. *Truesdell vs. Jeffries, 1 Caines' Rep. 190. n.*

A mere possessory title in the lessor, on whose possession the defendant, without claim or colour of title, had entered, will be sufficient to enable him to maintain this action. *Jackson ex dem. Murray & Al. vs. Hazen, 2 Johns. Rep. 22.*

If the lessor in Ejectment show himself to have been in peaceable possession, and that he was forcibly dispossessed, it will be sufficient to entitle him to recover, and the defendant cannot set up title in bar. *The People vs. Leonard, 11 Johns. Rep. 504.*

Where a person acting, in relation to land, as executor, and consistently with his duty as such, permits another to enter upon and occupy the land, he, or those who claim under him, cannot maintain Ejectment against such tenant; and his declarations claiming the land in his own right are inadmissible in support of the action, as evidence of title; such declarations being evidence only as to the possession. *Jackson ex dem. Brown & Al. vs. M'Vey, 15 Johns. Rep. 234.*

A recovery in Ejectment does not prejudice the right of the defendant, and he may bring his action, and recover, according to the interest which he had before the recovery against him. So, where the defendant in Ejectment, having had thirty-eight years of undisturbed possession, suffered a judgment by default, and was turned out of possession; *Held*, that he might, notwithstanding, recover the premises on the strength of his previous possession. *Jackson ex dem. Wright & Al. vs. Dieffendorf, 3 Johns. Rep. 269.*

In Ejectment the oldest possession, even for less than twenty years, carries with it a presumption of title that is sufficient to put the defendant on his defence, and will overcome the latter possession of a mere trespasser. *Den ex dem. Penton & Al. vs. Sinnickson & Al. 4 Halsted's Rep. 149.*

In Ejectment, a man cannot object his own possession for twenty years

But, if the possession of the party be affected by any of the provisions of the second section of the Statute of Limitations ;(p) or, if the

(p) *Ante*, 46.

against his own deed given within that period. *Duval & Al. vs. Bibb*, 3 *Call's Rep.* 362.

If there are articles of agreement for the sale of lands, in which no time is stipulated for delivery of possession, but before the day of payment of the purchase money, the vendee obtained possession by the consent of the vendor, and the purchase money not being paid, the vendor obtains possession unlawfully, by the act of a third person, the vendee may recover in Ejectment without tendering the purchase money or bringing it into court. *Harris vs. Bell*, 10 *Serg. & R. Rep.* 39.

Where one in possession of land claiming title but having no other right, conveys the land by quit claim deed ; and the grantee enters upon, and improves part, claiming title according to his deed, the possession of the residue continuing in the grantor, the possession of the grantor is the possession of the grantee ; and the latter may maintain Ejectment grounded upon such a possession against the grantor or any one who is in by subsequent possession without title. *Jackson ex dem. Weidman vs. Hubble*, 1 *Cowen's Rep.* 613.

For, in Ejectment, where neither party has title, the one showing the prior possession shall recover, unless the last possession have been adverse for twenty years. *Ibid.*

A plaintiff in Ejectment may, in some cases, recover on a bare possession only, without showing title ; as where there has been an actual ouster of the tenant, or against a trespasser without colour of title. *Fowke vs. Darnall*, 5 *Litt. Rep.* 317.

A title having been proved in *A.* who continues in possession from 1809 to 1814, and from whom the lessor of the plaintiff in Ejectment derives title, in 1815, it is not sufficient for the defendant to prove a bare possession by himself during the year 1814. *Doe d. Pitcher vs. Anderson & Al* 1 *Starkie's Rep.* 262.

After a possession of land for ninety years, in a thick settled part of the State, building a church on part of the land, and occupying part as a burial ground, a grant of the land, or at least of a pre-emption right from the Commonwealth, sufficient to recover in Ejectment, will be presumed.—*Mather vs. The Ministers of Trinity Church & Al.* 3 *Serg. & R. Rep.* 509.

In Ejectment, the jury having found twenty years possession in the plaintiff, an objection to one of his title deeds that it was not indented, and expressed no consideration ; is not sufficient to prevent a judgment in his favour. *Kinney vs. Beverly*, 2 *Hen. & Munf. Rep.* 318.

In Ejectment, if it appear from the evidence that the land in controversy was vacant, when the defendant came to the possession of it, peaceably and quietly, without any privity between him and the lessor of the plaintiff, or those under whom they claim ; the plaintiff cannot recover on the ground of the prior possession of the lessors, without proving twenty years uninterrupted adverse possession on their part, or on the part of those under whom they claim, or shewing a right to the possession by the death and

lands be the property of the Crown or the Church, the defendant may avail himself thereof, in answer to the claim arising from the adverse possession, without shewing any title in himself. If, indeed, the lands are Crown lands, and the claimant has been ousted by a wrong doer, after an uninterrupted possession for more than twenty years, a grant of them from the Crown will be presumed in his favour, unless the Crown is incapable of making such grant; but if such incapacity exist, a grant of course cannot be presumed; and no possession for less than sixty years will then be sufficient to enable him to maintain an ejectment. And, indeed, as the stat. 9 G. I. c. 16. only bars the *suit* of the Crown, after a continuing adverse possession for sixty years, but does not also give a title to the adverse possessor, it may be doubted whether *any* length of possession of Crown lands, not grantable by the Crown, will be a sufficient title to support an ejectment. (q)

[\*79] \*17. CORPORATION AGGREGATE, OR SOLE. [1.]

It was formerly doubted, whether an ejectment could be maintained by the King, because ejectment is for an injury done to the possession,

(q) *Goodtitle, d. Parker, v. Baldwin*, 11 East, 488.

seisin, in the manner prescribed by the act of Assembly, of some person under whom they claim. *Moody & Al. vs. M Kim*, 5 *Munf. Rep.* 374.

The heirs of a patentee of waste land, may recover in Ejectment against a person who had the use and occupation of the land *as his own*, in the life time of the patentee, and so continued until after his death, claiming to hold the same by *adverse* title; the duration of such possession having been less than twenty years. See *vs. Greenlee*, 6 *Munf. Rep.* 303. *Vide Clay vs. Ransome*, 1 *Munf. Rep.* 454.

In such case, if the heirs, being out of possession of the land, have executed a deed of bargain and sale of the same to a third person, such bargainee cannot recover in Ejectment, but the bargainors may. *Ibid.*

An undisturbed possession of twenty-four years before bringing the action, is sufficient to enable the plaintiff to recover in an action of Ejectment, - *Innis & Al. vs. Campbell & Al.* 1 *Rawle's Rep.* 373.

A continued adverse possession for twenty-one years gives a title to land, which is valid not only by way of defence, but sufficient to recover upon in Ejectment. *Pederick vs. Searle*, 5 *Serg. & R. Rep.* 236.

It is no objection to such title that after the twenty-one years had expired, the premises were recovered against such party in Ejectment. *Ibid.*

Nor is it material whether such recovery in Ejectment was by default, verdict, or confession. *Ibid.*

[1] In Ejectment by a corporation, the court will presume the demise to have been under their corporate seal. *University of North Carolina vs. Johnston*. 1 *Hayw. Rep.* 375. (*In Note.*)

and the King cannot be put out of possession. But this reasoning seems only to apply where the King is made *plaintiff*; and not where he is the *lessor of the plaintiff*; for it is the lessee, and not the lessor, who, by the legal fiction, is supposed to be ousted; and it is held, that where the possession is not *actually* in the King, but in lease to another, there, if a stranger enter on the lessee, he gains possession without taking the reversion out of the Crown, and may have his ejectment to recover the possession, if he be afterwards ousted; because, there is a possession *in pais*, and not in the King, and that possession is not privileged by prerogative. Hence it follows, that the *King's lessee* may likewise have an ejectment to punish the trespasser, and to recover the possession which was taken from him.(r)

In cases, however, included in the stat. 8 Hen. VI. 16. and 18 Hen. VI. 6., which prohibit the granting to farm of lands, seised into the King's hands upon inquest before escheators, until such inquest shall be returned in the Chancery, or Exchequer, and for a month afterwards, if the King's title in the same be not found of record, and avoid all grants made contrary thereto, the King cannot maintain an ejectment until all the previous requisites are complied with; for, even presuming the right and possession to be in the Crown immediately on the death of the person last seised, the King has no power to grant the same until after office found, and, consequently, he must be considered to be himself in possession, and, therefore, unable to [ \*80 ] give a title to his lessee.(s)

#### 18. RECTOR, OR VICAR, FOR TITHES.(t)

The Statute which gives this remedy for tithes, includes only lay impropriators, leaving spiritual persons to pursue the old remedy in the Ecclesiastical Court; though the doctrine has since been extended by analogy to tithes in the hands of the clergy.(u) But an ejectment for tithes can only be maintained against persons claiming, or pretending to have title thereto, and not against such persons as refuse or deny to set them out, which is called subtraction of tithes :(v) nor will it lie where the tithes are not taken in kind, but an annual sum is paid in lieu thereof.(w)

(r) *Payne's case*, 2 Leon. 205. *Lee v. Norris*, Cro. Eliz. 331.

(s) *Doe, d. Hayne, v. Redfern*, 12 East, 36.

(t) *Cornell v Clavering*, Ld. Raym. 739.

(u) Co. Litt. 159. *Baldwin v. Wine*, Cro. Car. 301.

(v) 2 and 3 Edw. VI. c. 13. s. 13.

(w) *Dyer*, 116, (b).

A parson cannot maintain ejectment for glebe land after sequestration.(x)[1]

### 19. TRUSTEES.

In all cases, in which the trusts are not executed by the statute of uses, the legal estate vests in the trustees, and, of course, in such cases, they may maintain ejectment.

The principles upon which this doctrine is founded have [\*81] already been discussed ;(y) and it, therefore, only remains \*to consider a few cases, in which the trustees have been held to take, or not to take, the legal estate.[2]

A distinction has been made, between a devise to a person in trust, to pay over the rents and profits to another,(z) and a devise in trust, to permit some other person to receive the rents and profits ; the legal estate, in the first case, being held to be vested in the trustee, and, in the latter, in the *cestui que trust* ; though, to use the words of Sir James Mansfield, C. J. in a recent case, “ it seems miraculous, how such a distinction became established ; for good sense requires, that in both cases, it

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| (z) <i>Dor, d. Grundy, v. Clarke</i> , 3 Campb. 447.  | 75. <i>Silvester d. Law, v. Wilson</i> , 2 T. R. 444.          |
| (y) <i>Ante</i> , 32, 33.                             | 444. <i>Jones v. Ld. Say and Sele</i> , 8 Vin. Abr. 262.       |
| (z) <i>Shep. Touch. 482. 1 Eq. Cas. Ab 383.</i>       | 262. <i>Broughton v. Langley</i> , Salk. 679. S. C. 1 Lut 814. |
| 384. <i>Shaplind v. Smith</i> , Brown Chan. Cas. 311. | <i>Burchett v. Durdant</i> , 2 Vent.                           |

[1] Where a party was presented to a rectory in consideration of his having given a bond to resign in favour of a particular person, at the request of the patron, and was instituted and inducted, and such bond was held to be void on the ground that it was simoniacal, and the king then presented A. B., and he was instituted and inducted : *Held*. that he might maintain Ejectment for the rectory against the person who had been simoniacally presented. *Doe ex dem. Watson, Clerk, vs. Fletcher, Clerk*, 8 *Barnew. & Cress. Rep.* 25.

In 1813, the commissioners for the enclosure of a parish, the tithes of which were vested in several lay impropriators. appointed meetings for receiving claims, and various claims were put in, but none in respect of tithes, within the time limited by the general enclosure act : Notwithstanding this, the commissioners in 1817, made an allotment in respect of the impropriate tithes of certain land occupied by him, which tithes as well as the land, J. claimed under the will of P. ; in 1820, W., who claimed these tithes under the heir of P, on the ground that they did not pass by P's will, brought an ejectment for the allotment made in respect of them ; *Held*, That having omitted to make his claim before the commissioners within the time limited by the act, he could not recover. *Doe ex dem. Watson vs. Jefferson*, 2 *Bingh. Rep.* 118.

[2] *Vide post*, Appendix, Note (B.)

should be equally a trust, and that the estate should be executed in the trustee ;—for how can a man be said to permit and suffer, who has no estate, and no power to hinder the *cestui que trust* from receiving ?”(a) It has, indeed, in several cases, been argued, that a devise to trustees to receive the rents and profits and pay them over, will not vest the legal estate in the trustees, unless something is required of the trustees, which renders it necessary that they should have an interest in the lands, as to pay rates and taxes, &c. ; but this doctrine has not yet been sanctioned by any decision of the Courts ; though, certainly, it has happened in all the latter cases, that the trustees have been required to do other acts, as well as pay the rents and profits.(b)

In cases where it is necessary, for the purposes of the \*trust, [ \*82 ] that the trustees should take the legal estate, it will be held to vest in them, though the devise be, that *they suffer and permit the cestui que trust* to receive the rents and profits ; as where the trust was, that the trustee should permit a *feme covert* to receive and take the rents and profits, during her natural life, for her sole and separate use, they were held to have the legal estate ; such construction being necessary to give legal effect to the testator's intention, to secure the beneficial interest to the separate use of the *feme covert*.(c) And where lands were conveyed to trustees, and their heirs, in trust, that the trustees should, with the consent of A., sell the inheritance in fee, and apply the purchase money to certain trusts mentioned in the deed, with a proviso, that the rents, issues, and profits, until the sale of the inheritance, should be received by such person, and for such uses, as they would have been, if the deed had not been made ; it was held, notwithstanding the proviso, that the estate was executed in the trustees immediately, even before A. had given his consent to the sale ; and that it was not a mere power of sale annexed to the legal estate of the owner.(d)

In like manner, where the devise was to A., in trust, to permit and suffer the testator's widow to have, hold, use, occupy, possess, and enjoy, the full, free, and uninterrupted, possession and use of all interest of moneys in the funds, and rents and profits arising from the testator's

(a) *Doe, d. Leicester, v. Biggs*, 2 Taunt. 109. 118.

(b) *Jones v. Ld. Say and Sele*, 8 Vin. Ab. 262. *Kenrick v. Ld. Beaucherk*, 3 B. & P.

175. *Doe, d. Hallen, v. Ironmonger*. 3 East, 538.

(c) *Harton v. Harton*, 7 T. R. 652.

(d) *Keene, d. Lord Byron, v. Leardon*, 8 East, 248.

houses, for her natural life, if she should remain unmarried ; and that her receipts for all rents, &c. with the approbation of any one of the trustees, should be good and valid, she providing for, and educating properly, the testator's children, and \*also paying certain annuities ; and in case the widow should marry again, then upon certain other trusts, it was held, that the use was executed in the devisees in trust, and upon this ground, that the testator, having made the approbation of the trustees necessary to the widow's receipts, showed that he did not intend to give her a legal estate ; and *Gibbs, J.* said, " The rule has been misconceived. Though an estate be devised to *A.* and his heirs, to the use of *B.* and his heirs, the Courts will not hold it to be an use executed, unless it appears, by the whole will, to be the testator's intent that it should be executed. The Courts will rather say the use is not executed, because the approbation of a trustee is made necessary, than that the approbation of a trustee is not necessary, because the use is executed. The very circumstance which is to discharge the tenants, is the approbation of one of the trustees.—'I leave my wife to receive the rents, provided there is always the control of one of the trustees upon her receipts.'—The testator, therefore, certainly meant that some control should be exercised,—and what could that control be, except they were to exercise it in the character of trustees ?" (c)

Where certain *freehold and leasehold* premises were devised to trustees, their heirs, &c. " to permit and suffer the testator's wife to receive and take the rents and profits, until his son should attain the age of twenty-one," and the will contained also subsequent devises of other lands to the same trustees, upon trusts clearly not executed by the statute ; as, for the payment of debts, raising portions for younger children, &c. and immediately after the last of the different devises, a proviso followed, " that it should be lawful for the trustees, and [ \*84 ] the survivor, at any time or \*times, till all the said lands, &c. devised to them, should actually become vested in any other person, or persons, by virtue of the will, or until the same, or any part thereof, should be absolutely sold, as aforesaid, to lease the same, or any part thereof," it was holden, that the legal estate in the freehold lands contained in the first devise, vested in the widow, notwithstanding that *leasehold* premises were contained in the same devise, (the legal interest in which,

of course, vested in the trustees,) and the subsequent leasing power given by the will; because the leasing power either extended to *none* of the lands contained in the first devise, or to such of them only, as were originally vested in the trustees, (namely, the leaseholds,) “the trustees having no control over the lands in the first devise for *any purposes of the testator’s will.*”(f)

Where the devise was, that the trustee *should pay unto*, or else, *permit and suffer* the testator’s niece to receive the rents, the legal estate was held to be in the niece, because the words, “to permit and suffer,” came last; and, in a will, the last words prevail, though in a deed the first.(g)

In a case, where the devise was, “I give and bequeath *my real estates, lands, &c.* and also my personal estate, &c. to *A. B.*, upon trust, to the intent, that the said *A. B.*, his heirs, &c. shall first dispose of my personal estate, or so much thereof as shall be sufficient for that purpose, in payment of my debts, &c. *and as to all my real estates, wheresoever and whatsoever, subject to my debts, and such charge or charges as I may now, or at any time or times hereafter \*think proper to make,* [ \*85 ] *I give, devise, and bequeath, the same to C. D., for the term of his natural life, with remainder to E. F., &c.*” it was holden, that the legal estate was vested in *C. D.*, because an intention, that the trustees should pay the debts, was not apparent on the face of the will, and, therefore, there was no reason for giving the legal estate to the trustees.(h)

As the statute of uses mentions only such persons as are *seised* to the use of others, it has been held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised*, but only *possessed*; and, therefore, when only a term of years is created, whatever the nature of the trust may be, the statute does not execute the uses, but the legal estate always vests in the trustees.(i)

And when a term of this kind is created, it does not cease when the trusts are satisfied, unless there is a proviso to that effect in the deed creating the term; and, therefore, when the deed contains no such proviso, the legal estate, however ancient the term may be, and notwithstanding it may have been assigned to attend the inheritance, will re-

(f) *Knight, d. Phillips, v. Smith*, 12 East, 455.

(g) *Doe, d. Leicester, v. Biggs*. 2 Taunt. 109. *Mansfield, C. J.* in delivering the judgment of the Court in this case, said, the rea-

son they assigned for their decision was given for want of a better.

(h) *Kenrick v. Beaucherk*, 3 B. & P. 175.

(i) *Dillon v. Fraine*, Poph. 70. 76. *Dyer*, 369. *Jenk.* 244.



main outstanding in the trustees, or their representatives, until it be surrendered[1] to the party beneficially interested, or merge in a larger estate.(j)

Copyhold estates, also, are not comprehended within the statute of uses ; because, a transmutation of possession, by the sole operation of the statute, without the concurrence or permission of the lord, [\*86] would be an infringement of the lord's rights, and would tend to his prejudice ; and, therefore, if a copyhold be surrendered to A., to the use of B., the legal estate will not be transferred to B., though he would be entitled, in equity, to the rents and profits, and to call upon A., for a surrender of the estate.(k)

It seems to have been held, in the case of *Roe, d. Ebrall, v. Lowe*,(l) that a *bona fide* lease, made by an equitable tenant in tail, will prevent the trustees, in whom the legal estate is vested, from recovering in ejectment against the lessee ; although, if the lease be granted under suspicious circumstances of fraud and imposition, the trustees will not be barred. But, from the more recent decisions, this principle seems to have been much shaken, and it is now very doubtful whether, in any

(j) *Vide Sugden's Vendors and Purchasers*, 8d Edit. 263. 293.

(k) *Co. Cop. s. 54. Gilb. Ten. 182.*  
(l) 1 H. Blk. 446.

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[1] A term of 1,000 years was created by deed in 1717, and in 1735 was assigned for the purpose of securing an annuity to A., and after that to attend the inheritance. A. having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been in the mean time taken of the term, except that in 1801, the devisee, in whose possession the deeds creating and assigning it, were found, covenanted to produce those deeds when called for. *Held*, that under these circumstances, the jury were warranted in an ejectment brought for the premises by the heir at law, to presume a surrender of the term. *Doe ex dem. Burdett vs. Wright*, 2 *Barnew. & Ald. Rep.* 710.

A term of years was created in 1762, and assigned over to a trustee in 1779, to attend the inheritance. In 1814, the owner of the inheritance executed a marriage settlement ; and in 1816 he conveyed his life interest in the estate to a purchaser as a security for a debt ; but no assignment of the term or delivery of the deeds relating to it took place on either occasion. In 1819 an actual assignment of the term was made by the administrator of the trustee in 1779, to a new trustee for the purchaser in 1816 : *Held*, that under these circumstances an Ejectment brought by a prior incumbrancer, against the purchaser, the jury were warranted in presuming that the term had, previously to 1819, been surrendered. *Doe ex dem. Pulland vs. Hilder*, 2 *Barnew. & Ald. Rep.* 783.

case, a lease from the *cestui que trust* can be set up against the trustee, without the aid of a court of equity.(m)

The principles upon which the case of *Goodtitle, d. Estwick v. Way*, was decided, namely, that the trustees of a term to satisfy creditors *not having notice of an agreement for a lease before the grant of the term*, may maintain an ejectment against the tenant in possession under the agreement, because the lessors of the plaintiff were not *clearly and unequivocally* trustees for the defendant, have, likewise, been since overruled ; and, it now seems, that an agreement for a lease, made before the creation of a trust, will in no case, after a proper notice to quit, bar the recovery of the trustees in ejectment.(n)

To obviate the inconvenience which may, at times\*arise, [ \*87 ] when an ejectment is brought by a *cestui que trust*, from the operation of the salutary maxim, that the legal title must prevail, as affecting his situation with his trustees, the jury will, in particular cases, be permitted to presume, that a regular surrender has been made by the trustees of their estate ; thereby clothing the *cestui que trust* with the legal title, and enabling him to recover in the action. Thus, a surrender will be presumed, if the purposes of the trust-estate have been satisfied ;(o) or if the beneficial occupation of the estate by the possessor, induces a supposition, that a conveyance of the legal estate has been made to the party beneficially interested ; or when the trust is a plain one, and a court of equity would compel the trustees to make a conveyance ;(p) But this presumption will not be made, if the surrender be a breach of the trust ; or against the owner of the inheritance who is interested in upholding it ;(q) or where the title of the party, for whom the presumption is required, is a doubtful equity only, until a court of equity has first declared in favour of the equitable title ;(r) nor can the presumption be made by the court, where the merits of the case would have warranted such presumption at the trial, if it appear, upon a special verdict, or special case reserved for their opinion, that the trust-estate, though satisfied, is still, in point of fact, outstanding in the trustees.(s)

(m) *Baker v. Mellish*, 10 Ves. Jr. 544.

(n) 1 T. R. 735.

(o) *Doe, d. Hodson, v. Staple*, 2 T. R. 684.

(p) *Doe, d. Syburn, v. Slade*, 4 T. R. 682.

(q) *Doe, d. Graham, v. Scott*, 11 East, 478.

(r) *Keene, d. Lord Byron, v. Deardon*, 8 East, 248.

(s) *Goodtitle, d. Jones, v. Jones*, 7 T. R. 43.

[ \*88 ] \*20. JOINT TENANT, COPARCENER, OR TENANT IN COMMON against his companion, on an actual ouster.(t)[I]

## 21. LUNATIC.

The ejectment must be brought in the name of the lunatic; for his committee is but a bailiff, and has no interest in the land.(u)

[ \*89 ] \*22. And to these, we may add, that an award, under a submission to arbitration, will give a good title on which to maintain this action; for, although the award cannot have the operation of conveying the land, there is no reason why the defendant may not conclude himself, by his own agreement, from disputing the title of the lessor of the plaintiff in ejectment. The parties consent, that the award of an arbitrator, chosen by themselves, shall be conclusive, as to the right of the land in controversy between them; and this is sufficient to bind them in the action of ejectment.(v)[1]

(t) *Ante* 56.

(u) *Drury v. Fitch*, Hutt. 16, *Cocks v.*

*Darson*, Hob 215. *Knipe v. Palmer*, 2 Wils.

130. *sed vide* 43 Geo. III. c. 76.

(v) *Doe, d. Morris, v. Rosser*, 3 East, 15.

[1] One tenant in common may maintain Ejectment against his co-tenant, though no actual ouster be proved. (*Per* SPENCER, J.) *Shephard vs. Ryers*, 15 *Johns. Rep.* 601. & *Vide* Page 55, n. [1]; [2] & [3]; Page 56, n. [1]; [2]; [3] & [4]; & Page 57, n. [1].

One tenant in common, cannot in general, maintain an action of Ejectment against his co-tenant without actual ouster. *Barnitz's Lessee vs. Casey*, 7 *Cranch's Rep.* 456.

[1] When an *award* settles the boundary of land, it is sufficient to enable the party to whom the land has been awarded, to bring an action of Ejectment. *Sellick vs. Adams*, 15 *Johns. Rep.* 197.

"An award whether it relates to the title, the possession, or the location, "or boundaries of land has not the operation of a conveyance. But the parties are concluded by their agreement, from disputing the location or boundaries, or title, as settled by the arbitrators. Its operation is in the nature of an estoppel. (*Doe v. Rosser*, 3 East, 15.—*Hunter v. Rice*, 15 East, 100. *Calhoun's Lessee v. Dunning*, 4 Dall. 120. *Lessee of Dixon, v. Morehead*, *Add Rep* 216, 219.) The award in such cases is not offered as evidence of title; but to prevent either party to it from setting up a title, &c. which had been negotiated by the award. (*Kyd on Aw. Phil. ed.* 1808, 62, *note* (d.) *Sellick v. Addams*, 15 *Johns.* 197. *Shepherd v. Ryers*, *id.* 497, and cases there cited. *Cox v. Jagger*, 2 Cowen, "650.") (*Per* SUTHERLAND, J., *delivering the Opinion of the Court*, in *Jackson ex dem. Edson & Al. v. Gager*, 5 Cowen's *Rep.* 383, 387.

## CHAPTER IV.

OF THE CASES WHICH REQUIRE AN ACTUAL ENTRY UPON THE LAND  
BEFORE EJECTMENT BROUGHT.

WHEN an entry is required, only to complete the claimant's title, as when a power is reserved to him to re-enter for the breach of any condition of a lease, or grant, the common consent rule will be sufficient to enable him to maintain ejectment, without any actual entry upon the lands in dispute; but when the entry is requisite to rebut the defendant's title, an actual entry upon them must be made, before the action can be supported.<sup>(w)</sup>[1] Such, at least, is the principle laid down by Lord *Mansfield*; but, the application of the latter part of it is now limited to cases where fines with proclamations have been levied; [2] for in all other cases the common consent rule to confess entry is sufficient; and it may be doubted, whether the necessity of an actual entry, even when a fine with proclamations has been levied, does not arise from the construction given to the words of the statute of fines,<sup>(x)</sup> rather than from the general principle above mentioned. By that statute, it is enacted, that, when a fine is levied with proclamations, persons wishing to

(w) *Per Lord Mansfield, C. J.* in *Goodright, d. Hare, v. Cater*, Doug. 477—84.

(x) 4 Hen. VII. c. 24.

[1] Where an estate of Freehold is granted upon condition in a deed, and there is a breach of the condition, an actual entry or claim by the grantor is necessary in order to revest the estate. *Chalker vs. Chalker*, 1 Conn. Rep. 79.

The bringing an action of disseisin is not a claim within the meaning of the law, nor a sufficient substitute for entry. *Ibid.*

& *Vide Page 10, n.*[2.]

[2] An actual entry is in no case necessary, except to avoid a fine. *Jackson ex dem. Bronck vs. Cryslar*, 1 Johns. Cases, 125.

A previous entry on land is not necessary to enable the plaintiff to maintain Ejectment, a right to enter is sufficient to support the action. *Leves of Rugge vs. Ellis*, 1 Bay's Rep. 107.

avoid such fine, must pursue their title, claim or interest, by way of *action* or *lawful entry*, within five years next after their title, claim, or interest, shall accrue; or (provided at such time they be under any [ \*91 ] legal disability) within five years next, after such disability shall cease; and as the action of ejectment was not used, at the time of the enactment of this statute, for the trial of titles, the word *action* in it has been interpreted to extend to *real actions* only, and not to comprehend the remedy by ejectment. When, therefore, a forfeiture is committed by the levying of a fine with proclamations, and the reversioner does not resort to a real action, it becomes necessary for him, if he mean to take advantage of the forfeiture, to have recourse to the other method pointed out by the statute, that is to say, to make a *lawful entry* upon the land; and, having made the *lawful entry*, and thereby avoided the fine, an ejectment will afterwards lie for the recovery of the forfeited lands, in the same manner as if the tenant had forfeited his estate, by the breach of any condition annexed to his grant.

This seems to be the true principle upon which an actual entry is deemed necessary, when a fine with proclamations has been levied; and it is sanctioned by all the modern decisions, although a different doctrine was formerly maintained. In 1703, it was declared by all the judges, (*Price*, B. excepted,) that, *in case of a fine*, there must be an actual entry; and the two first decisions which are extant after this declaration, interpret the maxim to extend to fines *generally*, whether with or without proclamations; and consider the necessity of an entry, to arise from the puissance of a fine at common law, and not from the provisions of the statute of fines. (y)

[ \*92 ] \*It is somewhat singular, that neither of these cases is noticed in any of the subsequent decisions by which they have been overruled; (z) although from the superiority of the modern doctrine, the omission can by no means be regretted. It is (to use Lord Mansfield's words) "absurd to entangle men's rights in nets of form without meaning; and an ejectment being a mere creature of the Court, framed for the purpose of bringing the right to an examination, an actual entry can be of no service." (a)

(y) *Berrington v. Parkhurst*, And. 125, S. C. Stran. 1086. S. C. 13 East, 489. *Tupner d. Peckham, v. Merlott, Willes*, 177.

(z) *Oates, d. Wigfall, v. Brydon*, Burr. 1880. *Jenkins, d. Harris, v. Pritchard*, 2

Wils. 45. *Doe d. Duckett, v. Watts*, 9 East, 17.

(a) *Goodright, d. Hare, v. Cator*, Doug. 477. 85.

It was in one case held by the Court of King's Bench, at a trial at bar in ejectment, that where one had made an *actual entry* into the lands *before* any fine was levied, and brought his ejectment *after*, and laid the demise in the declaration before the time of levying the fine, such entry was sufficient to entitle him to a verdict. It is difficult to discover the principle of this decision; for it is evident, by the words of the statute, that an entry *before* the levying of a fine, cannot *avoid* a fine *afterwards* levied; and, if it be said, that the entry and demise, being before the levying of the fine enabled the lessor to shew a good title at the time of the demise, and so prevented the defendant from giving the subsequent fine in evidence, there seems no reason why the same effect should not be produced, by simply laying the demise before the time of levying the fine, without making an actual entry, since it is clear, that an *actual entry* is never necessary but to *avoid* a fine. (b)[1]

\*A fine cannot be avoided by entry, except when the person [ \*93 ] who seeks to avoid it has a right to enter; for, if the right of entry be taken away by the fine, and a right of action only remain, as if the fine operate as a discontinuance of the estate, a real action must be resorted to. Such is the case when a fine is levied by a tenant in tail. (c) But, if a tenant in tail, first alienate his estate by modes of conveyance, which transfer only the possession, and not the right of possession, as by bargain and sale, lease and release, covenant to stand seised, &c. and the grantee be seised *by virtue of such conveyance*, a fine levied afterwards by the tenant in tail, will not operate as a discontinuance of the estate-tail; but the remainder-man, or reversioner, after the death of the tenant in tail, without issue, may enter, provided his entry be made within five years next after his title accrues. (d)

A fine levied by a tenant for life, operates as a forfeiture of his estate, and divests also the estate of the remainder-man or reversioner, leaving in him only a right of entry. An actual entry must, therefore, be made upon the lands, in order to avoid such fine, before ejectment can be maintained; (e) and this entry may be made, and the ejectment brought, by the party next in remainder, either within five years next after the time

(b) *Musgrave, d. Hilton, v. Shelly*, 1 Wils. 214.

(d) *Seymour's case*, 10 Co. 96. *Ante*, 84, 85.

(c) *Doe, d. Odgers, v. Whitehead*, Barr. 704.

(e) *Doe, d. Compere, v. Hicks*, 7 T. R. 432.

[1] *Vide Page 10, n. [1], and Page 90, n. [1] & n. [2].*

when the proclamations upon the fine are completed, by reason of the forfeiture, or within five years after the natural determination of the preceding estate. When, also, there are several remainder-men in succession, the laches of one remainder-man will not prejudice the others, but each remainder-man will be entitled to his right of entry within [ \*94 ] five years after his title accrues, \*notwithstanding the laches of those who have preceded him. But this right can only be executed by the original remainder-men and reversioners, and will not pass by assignment or devise.(f)

When a lessee for years makes a feoffment, and then levies a fine to his feoffee, an actual entry is necessary to avoid the fine,(g) and the reversioner may then likewise enter within five years next after levying the fine or within five years next after the expiration of the term.(h)

In a late case, where a lessee for years levied a fine with proclamations, after which, his lessor, without entering upon the land, conveyed his reversion to a third person, who brought an ejectment for the forfeiture, Lord *Ellenborough*, C. J., in delivering the judgment of the Court, said, that "they could not find any case which established a difference between tenant for life, and tenant for years, as to the necessity of an entry to avoid their estates, in case of a forfeiture incurred by the levying of a fine, but an entry was necessary against both."(i) From the report of the case, it does not clearly appear, whether, by the entry, here spoken of, an actual entry is intended, or, whether the Court only meant to say, that when a tenant for years levies a fine, his estate does not *ipso facto* cease and determine, but continues until re-entry, that is to say, until the reversioner brings an ejectment for the forfeiture.

[ \*95 ] The latter, seems the more reasonable interpretation, \*as it is difficult to discover upon what principle an actual entry is more necessary, when a forfeiture is incurred by a tenant for years by levying a fine, than when the forfeiture arises from the breach of any other condition. A fine by a tenant for years, is not within the provisions of the statute of fines. It does not, like the fine of a tenant for life,

(f) *Goodright, d. Fowler, v. Forrester*, 8 East, 552.

(g) *Hunt v. Bourne*, Salk. 339. and the cases there cited, *Pomfret v. Windsor*, 2 Ves. 472, 481.

(h) *Whaley v. Tinkard*, 2 Lev. 52. S. C.

1 Vent 241. S. C. Sir T. Raym. 219. *Vide* *cont. per Catline, J., Stowell v. Zouch*, Plow. 374,(a) *Podger's case*, 9 Co. 105,(b).

(i) *Fenn, d. Mathews, v. Smart*, 12 East, 444.

divest the estate of the reversioner : non-claim does not give effect to it : and, in fact, from the want of a freehold interest in the parties, the fine is wholly inoperative.(j) But the necessity of an actual entry, when a fine is levied, arises only from the operation of the statute of fines, and is merely for the purpose of revesting the estate which the fine has divested, and, therefore, must be altogether useless in a case not within the statute, and where the estate of the reversioner is not affected by the fine. In confirmation also of this interpretation, it is laid down by Lord Kenyon, [C. J., in *Peaceable d. Hornblower v. Read*,(k) that if a tenant for years levies a fine, no entry of the landlord is necessary, in order to enable him to maintain ejectment at the end of the term ; and, in a recent case, where a lessee, for the life of his lessor, continued in possession after his lessor's death, until his own death, without payment of rent, after which his son took possession, and having kept possession for two years, without payment of rent, levied a fine with proclamations, the Court held, that no entry was necessary to avoid this fine, and Lord Ellenborough, C. J., said "it surely needs not much labour to discover, that if the fine operates nothing, it cannot require an entry to avoid it."(l)[1]

\*As the possession of one joint tenant, parcener, or tenant [ \*96 ] in common, is, in contemplation of law, the possession of his companion also,(m) a fine levied by a joint tenant, parcener, or tenant in common, previously to an actual ouster of his companion, will not operate to divest his companion's estate ; and if the party so levying the fine afterwards actually oust his companion, an ejectment may be maintained against him, without an actual entry into the lands.(n) In like manner, if one of two tenants in common of a reversion, levy a fine of the whole, an actual entry is not necessary by the other tenant to avoid it.(o)[1]

(j) *Shep. Touch.* 14. and the cases cited in *Hunt v. Bowne*, 1 Salk. 339. 341, note b.

(k) 1 East, 568—74.

(l) *Doe, d. Burrell v. Perkins*, 3 M. & S. 271. et vide 1 Saund. 319,(c)

(m) *Ford v. Gray*, Salk. 285. S. C. 6 Mod. 44. *Smales v. Dale*, Hob 120.

(n) *Peaceable, d. Hornblower, v. Read*, 1 East, 568.

(o) *Roe, d. Truscott, v. Elliot*, 1 S. & B. 85.

[1] A second son who lived with his father at a house of which the father died seized in fee, continued to reside in the house after his Father's death, and levied a fine with Proclamations ; Held, that this was no Disseisin of the eldest son ; and that no entry by him was necessary to avoid the fine. *Doe ex dem, Davis vs. Davis*, 1 Carr. & P. Rep. 130.

[1] If one of two tenants in Common of a reversion levy a fine of the



If all the proclamations have not been completed, the fine will only enure as a fine at common law, and no entry will be necessary to avoid it.(p) When, also, a tenant for life does not levy, but merely accepts a fine, although such acceptance will create a forfeiture of his estate,(q) yet, as the person who levied the fine had not any estate or interest in the lands, at the time of levying the fine, it neither alters the estate of the tenant for life, nor divests the remainder or reversion, and, consequently, no entry, is necessary to avoid it.(r)

The entry must be made by the party who claims the land, or by some one appointed for him;(s) although if the entry be made by a [ \*97 ] stranger, in the name of the person \*who has the right without any previous command from him, and he afterwards assent to the entry, within five years after the fine is levied, such entry will be sufficient.(t) If, however, the assent be not given within the five years, any subsequent assent will not avail; for the statute of fines being made for the purpose of repose and tranquility, is always taken strictly.(u)

But a guardian by nurture, or in socage, may enter in the name of his ward, without any command or assent, and such entry shall save his right. So, also, the remainder-man, or reversioner, or lord of a copyhold, may enter in the name of the tenant for life, years, or copyholder; or these particular tenants in the name of the reversioner, or remainder-man; or the lord, without any command or assent, on account of the privity between these persons.(v) So, likewise, an entry by a *cestui que trust* will be sufficient.(w)

When one joint tenant, tenant in common, or parcener, enters generally into lands, it will be sufficient to avoid the effect of a fine as to his companion, from the principle before mentioned, that the possession of

(p) *Doe, d. Duckett, v. Watts*, 9 East, 17, *sed vide* *Tupner, d. Peckham, v. Merlott*, Willes. 177.

(q) Co. Litt. 252.(a).

(r) *Podgar's case*, 9 Co. 106.(b). *Green v. Proude*, 1 Mod. 117. S. C. 1 Vent. 257, [8].

(s) Co. Litt. 253.(a).

(t) Co. Litt. 245.(a), *Fitchet, v. Adams*, Stran. 1128.

(u) *Pollard, v. Luttrell*, Pop. 108. S. C. Moore, 450. *Audley's case*, Moore, 457. *Podger's case*, 9 Co. 106.(a). *Audley v. Pollard*, Cro. Eliz. 561.

(v) *Podger's case*, 9 Co. 106.(a).

(w) *Gree v. Rolle*, 1 Ld. Raym. 716.

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whole, such fine does not require an actual entry by the other tenant in common to avoid it. *Doe ex dem. Truscott vs. Elliot*, 1 Barn. & Ald. Rep. 85.

one joint tenant, in common, or parcener, is the possession of his companion also.(x)]1]

With respect to the mode of making the entry, it must \*be [\*98] upon the lands comprised in the fine; for an entry into other lands, claiming those comprised in the fine, will not be sufficient.(y) Thus, where a fine having been levied, the lessor of the plaintiff proved that, at the gate of the house in question, he said to the tenant, that he was heir to the house and land, and forbade him to pay more rent to the defendant, but did not enter into the house when he made the demand, it was agreed that the claim at the gate was not sufficient; but, as it appeared, that there was a court before the house which belonged to it, and that, though the claim was at the gate, yet that it was on the land, and not in the street the claim was holden good.(z) But if a person be prevented by force, or violence, from entering on the lands whereof a fine has been levied, he must then make his claim as near the land as he can; which, in that case, will be as effectual, as if he had made an actual entry.(a)

When all the lands lie in one county, the party may enter into any part of them, making a declaration in the name of the whole; but if the lands lie in different counties, there must be separate entries for the several counties.(b) \*The entry must also be made *animo clamandi*, with an intention of claiming the freehold[1] against

(x) Brook. Ab. *Entre Con.* 37. 1 Roll. Abr. 740. *Doe, d. Gill, v. Pearson*, 6 East, 173.

(y) *Focus v. Salisbury*, Hard. 400.

(z) Anon. Skin. 412.

(a) Litt. s. 419. Co. Litt. 258,(b):

(b) Litt. s. 417.

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[1] The legal entry of one co-heir, or tenant in common, enures to the benefit of their co-heirs and co-tenants, not only so far as concerns themselves, but strangers. *Carothers & Al. vs. The Lessee of Dunning & Al.*, 3 Serg. & R. Rep. 373.

[1] Where an entry was made on land by a party, it is not error in the judge, to leave it to the jury to decide, with what intent the entry was made. *Carothers & Al. vs. The Lessee of Dunning & Al.*, 3 Serg. & R. Rep. 373.

Entering on Land and making a survey, if done *animo clamandi*, may amount to entry and claim: But if the intent be doubtful; the question whether it is an entry and claim, is for the jury. *Miller & Al. vs. Shaw*, 7 Serg. & R. Rep. 129.

the fine;(c) and, therefore, when, upon a special verdict in ejectment, it was found that a fine had been levied of the premises, and that the lessor of the plaintiff entered upon the premises, with intent to make the demise in the declaration mentioned, but not for the purpose of avoiding the fine, it was held that such entry was not sufficient.(d)

By the statute 4 Anne, c. 16. s. 16. it is enacted, that no claim or entry, to be made upon any lands, &c. shall be of any force to avoid a fine levied with proclamations according to the statute, or a sufficient entry within the statute of limitations; unless upon such entry or claim, an action be commenced within one year after the making of such entry or claim, and prosecuted with effect; and, therefore, if the claimant fail in the ejectment brought in consequence of the entry, and have not time to commence a second ejectment within twelve months after the making of the entry, a second entry must be made. But if the actual entry be once made, and the claimant proceed to execution, in an ejectment brought thereon, it seems clear that the fine is totally avoided, and that no second entry will be necessary, if he be afterwards turned  
[\*100] out of possession, by the wrong-doer who levied the fine; for the fine being once avoided, shall be void for ever.(e)

It has been questioned, whether an actual entry is not necessary to prevent the operation of the statute of limitations;(f) but it seems quite clear, from the whole current of authorities, that no entry is necessary, if the action be commenced within the twenty years. If, however, the twenty years be near expiring before an ejectment is brought, it will be prudent to make an actual entry; for it seems, that if an actual entry be made *before* the expiration of the twenty years, an ejectment may be brought at any time within twelve months after the entry, although the twenty years should in the mean while have expired; and, also, that if the lessor of the plaintiff fail in his first ejectment, whether brought within the twenty years or after, he may, from the provisions of the statute of Anne before mentioned, bring a second, provided this second ejectment be likewise brought within a year after the entry is made; whereas, if an ejectment be brought without an actual entry, and the claimant fail in it, and, before another ejectment can be brought the

(c) *Clarke v. Phillips* 1 Vent. 42.

(e) *Stowell v. Zouch*, Plowd. 353. 356.

(d) *Berrington, d. Dormer, v. Parkhurst*, And. 125. S. C. Stran. 1086. S. C. Willes, 327. S. C. 13 East, 489.

(f) *Goodright, d. Hare v. Cater*, Doug. 477. 485, (n. 1.)

twenty years expire, he will be entirely barred of this remedy ; because the entry which is confessed by the defendant in the first ejectment being only a fictitious entry, and the second ejectment being a *new action*, and not a continuance of the first, it amounts to the same thing as if no entry had been confessed, or no ejectment had been brought until after the expiration of the twenty years.[1]

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[1] An entry to avoid a Statute of Limitations, must be an entry for the purpose of taking possession. *Jackson ex dem. Hardenburgh vs. Schoonmaker*, 4 Johns. Rep. 390.

The plaintiff having discontinued a former ejectment, and having lain by, while valuable improvements were made on the land, are circumstances from which the jury may infer an abandonment of his claim. But if the delay be short and no improvements be made, it is of little moment. *Cluggage & Al. vs. Duncan's Lessee*, 1 Serg. & R. Rep. 111.

Abandonment of claim is not in all cases a matter of fact ; it may be a conclusion of law from facts. If a man make a settlement, and leave it for a great length of time, it will not avail him to say, that he keeps up his claim. Such verbal claims have no effect against the act of relinquishing possession, and in such case it is the right of the judge to declare the conclusion of law. *Ibid.*

## CHAPTER V.

## OF THE ACTION OF EJECTMENT AS BETWEEN LANDLORD AND TENANT.

THE modern action of ejectment is not confined in its beneficial effects solely to the trial of disputed titles. It is also the common remedy for landlords, on the determination of tenancies, to recover the possession of their lands from refractory tenants; and it, therefore, properly belongs to this treatise, to inquire into the several relations of landlord and tenant, with regard to this remedy; and to point out the different ways by which the tenant's title to the possession may be determined, and the right of entry in the landlord accrue.

A tenancy may be determined in three several ways; first, by the effluxion of time, or the happening of a particular event; secondly, by a notice, from the landlord to the tenant, to deliver up the possession, or *vice versa*; and, thirdly, by a breach, on the part of the tenant, of any condition of his tenancy, as, by the non-payment of rent, or the non-performance of a covenant.

No comments are necessary upon the first of these divisions: it is sufficient to say generally, that, when the time expires, or the particular event happens, the tenancy is at once determined; and that the [ \*102 ] landlord may immediately maintain an ejectment to recover his possession, without giving any previous notice to the tenant.(g)[1]

(g) *Roe, d. Jordan v Ward*, 1 H. Blk. 97.

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[1] Where a lease is to expire at a time certain, a notice to quit is not necessary, in order to recover in ejectment. *Bedford vs. M'Elherron*, 2 *Serg. & R. Rep.* 49.

Where *A.*, by his attorney, executed a lease to *B.* for three years, and after the expiration of the term, *B.* applied to the attorney, to know if he was authorised by *A.* to enter into a new agreement, and the attorney replied that he was not, but said that *B.* might continue in possession of the premises, until he heard from *A.*; *Held*, that *B.* was after the expiration of the term, a mere tenant at sufferance, and not entitled to notice to quit pre-

The cases comprised in the second division must be treated of more

vious to the bringing of an Action of Ejectment. *Jackson ex dem. Van Cortlandt vs. Parkhurst & Al.*, 5 Johns. Rep. 128.

To entitle the defendant to notice to quit, there must be a privity either of contract or of estate between the lessor and the defendant. *Jackson ex dem. Ferris vs. Fuller*, 4 Johns. Rep. 215.

There must be a tenancy, or existing relation of landlord and tenant. *Jackson ex dem. Whitbeck vs. Deyo*, 3 Johns. Rep. 422. *S. P. Jackson ex dem. Phillips vs. Aldrich*, 13 Johns. Rep. 106.

A tenant at will is not entitled to notice to quit. *Jackson ex dem. Vandenberg & Al. vs. Bradt*, 2 Caines' Rep. 129. (*Sed Vide Jackson ex dem. Livingston vs. Wilson*, 9 Johns. Rep. 267, in which the Court seem inclined to the opinion that he is entitled to notice.)

If a person, holding under adverse title, make application to the lessor of the plaintiff to be deemed his tenant, there is no tenancy created, and he is not entitled to notice. *Jackson ex dem. Viely & Al. vs. Cuerden*, 2 Johns. Cas. 353.

Where the defendant had originally entered adversely, a permission by one of the lessors of the plaintiff to continue in possession, and a disclaimer by the defendant to hold adversely, will not constitute him tenant so as to entitle him to notice to quit. *Jackson ex dem. Dill & Al. vs. Tyler*, 2 Johns. Rep. 444.

A servant or bailiff in the possession of lands, is not entitled to a notice to quit. *Jackson ex dem. Fitzroy & Al. vs. Sample*, 1 Johns. Cas. 231.

If a person holding land by virtue of a parol gift, and who is consequently but a tenant at will, lease the land, and the donor merely permit the lessee to build and enjoy the term, the relationship of landlord and tenant is not created and the lessee is not entitled to notice to quit. *Jackson ex dem. Van Alen vs. Rogers*, 1 Johns. Cas. 33. *S. C. 2 Caines' Cas. Err.* 314.

*A.* entered on the land of *B.*, with his permission, as a mere occupant, without any rent being reserved; *B.* sold the land to *C.*, under whom *A.* continued in possession, and afterwards sold all his right, &c., to *D.*, who took possession and claimed to hold under the deed from *A.*; this disclaimer was held, to be sufficient to dispense with a previous notice to quit. *Jackson ex dem. Locksell & Al. vs. Wheeler*, 6 Johns. Rep. 272.

But when the disclaimer was made after the date of the demise, and no notice to quit was shown, or other determination of the tenancy, so as to prove a right of entry, the plaintiff was non-suited. *Ibid.*

But the following sections of the "*Revised Statutes*," Part 2, Chap. 1. Tit. 4, §§ 7, 8, & 9, (*Vol. 1, p. 745.*) require notice to be given to Tenants who hold over after the expiration of their terms.

"§ 7. Wherever there is a tenancy at will, or by sufferance created, by the tenant's holding over his term, or otherwise, the same may be terminated by the landlord's giving one month's notice in writing to the tenant, requiring him to remove therefrom.

"§ 8. Such notice shall be served by delivering the same to such tenant, or to some person of proper age residing on the premises; or if the tenant can not be found, and there be no such person residing on the pre-

fully ; and, to understand perfectly the principles upon which they have been decided, it will be necessary to give a short history of that species of tenancy, now called a tenancy from year to year.

It has already been observed, that, until the reign of King Henry VII., even a tenant, having a lease of lands for a definite period, had not a full and complete remedy when ousted of his possession. The tenants who, during those times, occupied lands without any specific grant, held them by a far more precarious tenure. A general occupation of lands, that is to say, a holding of the lands of another, without any certain or determinable estate being limited therein, was then considered as a holding at the will and pleasure of the owner of the land ; and the tenant was liable to be ejected at any moment, by the simple determination of his landlord's will. But the same enlightened policy, which secured to lessees for years the complete possession of their terms, [ \*103 ] soon extended itself, also, to those general \*holdings, then called tenancies at will ; and, in the reign of King Henry VIII.,<sup>(h)</sup> we find it holden by the courts, that a general occupation should be considered to be an occupation from year to year ; and that a person so holding should not be ejected from his lands, without a reasonable notice from his landlord to relinquish the possession. It was, also, at the same time, settled, that this reasonable notice should be a notice for half a year, expiring at the end of the tenancy ; because, otherwise, a notice, reasonable as to duration, might be given, which would, notwithstanding, operate greatly to the prejudice of the tenant by ejecting him from his lands immediately before the harvest, or other valuable period of the year : and this rule has remained unaltered to the present day, except where a different time is established, either by express agreement, or immemorial custom.

A general occupation of land now, therefore, enures as a tenancy from year to year, determinable, and necessarily determinable,<sup>(i)</sup> by a

(h) 13 Hen. VIII, 15,(b).

(i) *Doe, d. Warner, v. Brown*, 8 East, 165.

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"mises, such notice may be served by affixing the same on a conspicuous part of the premises, where it may be conveniently read.

"§ 9. At the expiration of one month from the service of such notice, the landlord may re-enter, or maintain ejectment, or proceed in the manner prescribed by law, to remove such tenant, without any further or other notice to quit."

regular notice to quit ;[1] and a holding merely at the will of the landlord, according to the ancient meaning of the term, is an estate unknown in modern times,(j) unless when created by express agreement between the parties.(k) There is, indeed, an implied modern tenure, denominated a tenancy at will ; but it differs materially from the old tenancy so called ; and, in South, is scarcely distinguishable from a mere permissive occupation of the land, independent of the relationship of landlord and tenant. This kind of tenancy arises, when the party is in \*possession of the premises with the privity(l) and consent of [104] the owner, no express tenancy having been created, and no act having been done by the owner, impliedly acknowledging such party as his tenant. As where he has been let into possession pending a treaty for a purchase[1] or a lease ;(m) or under a lease, which is void ;(n) or where, having been tenant for a term which has expired, he continues in possession, negotiating for a new one.(o) In all these, and

(j) *Timmins v. Rawlinson*, 3 Barr. 1608—9.

(k) *Richardson v. Lengridge*, 4 Taunt. 128.

(l) *Doe, d. Knight, v. Quigley*, 2 Campb. 505. *Night, d. Lewis, v. Beard*, 18 East, 216. *Hogan v. Johnson*, 2 Taunt. 148. *Doe, d. Lesson, v. Sayer*, 3 Campb. 8.

(m) *Goodkille, d. Galloway, v. Herbert*, 4 T. R. 680. *Doe, d. Warner, v. Browne*, 8 East, 165.

(n) *Doe, d. Hollingsworth, v. Stannett*, 2 Esp. 717.

(o) *Denn, d. Brune, v. Rawlins*, 10 East, 251. *Doe, d. Foley, v. Wilson*, 11 East, 56.

[1] A person entering upon land with the permission of the owner, as an occupant, without reserving any rent, and with leave to make improvements, will after eighteen years possession, be considered a tenant from year to year, and as such, entitled to notice to quit. *Jackson ex dem. Livingston vs. Brya*, 1 Johns. Rep. 322.

And where the person who originally entered, sold his improvements to a third person, who took possession, *Held*, that such third person was entitled to a notice to quit. *Ibid*.

A. entered into possession of land, as tenant to B., under an agreement for the hire of the land, for one year, at 100 dollars, and held over the year ; *Held*, that after the year, he was a tenant at sufferance, and not entitled to a notice to quit. *Jackson ex dem. Anderson & Al. vs. M'Leod*, 12 Johns. Rep. 182.

Where A., a lessee, agreed to sell his lease to B. for a certain sum, and indorsed his name on the lease, and delivered it to B., who paid him the purchase money, and agreed to pay the rent in arrear, and to become due on the lease ; *Held*, that this was an agreement for a sale, and that the relation of landlord and tenant did not exist between them, so as to entitle B. to a notice to quit. *Jackson ex dem. Stewart vs. Kingsley*, 17 Johns. Rep. 158.

[1] Where by an agreement for the sale of lands, the defendant is, on delivery of the possession, to pay part of the purchase money, the residue



the like cases, it is holden, that the party being lawfully in possession, cannot be ejected, until such lawful possession is determined, either by demand of possession, breaking off the treaty,[2] or otherwise, and the party is called a tenant at will;[3] but, in any of these cases, if the

to be paid at future periods, and the defendant pays part, and takes possession under the agreement, the vendor cannot maintain ejectment without giving notice to quit. *Jackson ex dem. Ostrander vs. Rowan*, 9 *Johns. Rep.* 330.

Notice to quit is necessary, before the landlord can bring ejectment against his tenant from year to year, or at will, unless some act has been done which determines the tenancy; and so generally, wherever the tenant enters into possession with the assent of the landlord, no definite period being fixed for the continuance of the possession. *Jackson ex dem. Church vs. Miller*, 7 *Cowen's Rep.* 747.

The *Grantor* of a small lot of land remained in possession of the premises conveyed for twenty-seven years, and no entry or act of ownership on the part of the *Grantee* was shewn; it was *Held*, that such possession was not adverse; that nothing but a clear, unequivocal and notorious disclaimer, of the title of the *Grantee*, could render the possession, however long continued, adverse. It was further *Held*, that the defendant *was not entitled* to notice to quit; that the relation of landlord and tenant did not subsist between the *Grantor* and those claiming under the *Grantee*; the more especially, as the nature and situation of the property repelled the presumption of a hiring of the premises by the *Grantor*. *Jackson ex dem. Bowen vs. Burton*, 1 *Wend. Rep.* 341.

[2] Where an agreement was made between *A.* and *B.* that the former should sell certain premises to *B.*, if it turned out that he had a title to them, and that *B.* should have the possession from the date of that agreement; *Held*, that an ejectment could not be maintained by *A.* against *B.* without a demand of possession although the object of the action was to try the title to the premises. *Doe ex dem. Newby vs. Jackson*, 1 *Barnew. & Cress. Rep.* 448.

[3] A tenancy at will is held to be a tenancy from year to year, merely for the purpose of a notice to quit. *Bradley vs. Covel*, 4 *Cowen's Rep.* 349.

A shorter notice (*e. g.* three months,) will terminate the tenancy; but in such case where the holding is at a stated rent, the notice turns the tenancy at will into a tenancy from year to year, running from the expiration of the first notice; and imposes the necessity of giving a notice to quit of six months, terminating on a day in the year corresponding with the termination of the first notice, in order to warrant an ejectment; and the holding over upon the tenancy from year to year is at the former rent. *Ibid.*

Where a tenant holds over after such notice without any new stipulation, the law implies an agreement that it should be at the former rent. *Ibid.*

A rector in *December*, 1816, granted, bargained, sold and demised the rectory and all the glebe lands, tithes, &c. to a trustee for securing an annuity for a term of years, if he the rector should so long live. This conveyance having been made after the passing of the 43 G. 3. c. 84. and before

landlord receive rent whilst the party is so in possession, or do any other act amounting to an acknowledgment of a subsisting tenancy, a tenancy from year to year will be created thereby.(p)[4]

It is singular, that we do not find in the old authorities any decisions relative to notices to quit, although the practice of giving them has been so long established ; but, during the last fifty years, they have become objects of considerable attention to our courts, and there is now no diffi-<sup>\*</sup>culty in reducing their requisites to a clear and [105] satisfactory system.

In considering the uses and requisites of the notice to quit, our first inquiry will be directed to those particular <sup>\*</sup>cases in [106] which implied tenancies from year to year are created, although the direct relationship of landlord and tenant does not exist ; we shall then consider by whom, and to whom, the notice should be given ; then proceed to the form of the notice, and the particular times required in certain cases, for its expiration ; and, lastly, point out the means by which the notice may be waived.

No tenancy from year to year exists between a mortgagor and his mortgagee ; but the mortgagee may maintain an ejectment against the

(p) *Doe, d. Rigge, v. Bell*, 5 T. R. 471. *Weaver, v. Belcher*, 3 East, 449, 451. *Doe, Clayton v. Blakey*, 8 T. R. 3. *Thunder, d. Warner, v. Browne*, 8 East. 165.

the passing of 57 G. 3. c. 99., was held to be a valid conveyance, and to pass the legal estate to the trustee.

The rector succeeded to the rectory, upon the death of the former incumbent, in April, 1816. A. and B. were then in the possession of the glebe lands, having been tenants of the former incumbent, and they continued in possession until after December, 1816, when the rector conveyed them to the trustee for securing the annuity : Held, that the latter could not maintain an ejectment against A. and B. without giving them a notice to quit. *Doe dem. Cates & Al. vs. Somerville*, 6 Barnew. & Cress. Rep. 126.

[4] A lessee who has taken possession of more land than he was entitled to by his lease, and rent has been paid and received for the entire premises in his possession, becomes tenant from year to year, and the lessor cannot bring Ejectment for the land not included in the lease, without shewing a notice to quit. *Jackson ex dem. Livingston & Al. vs. Wilsey & Al.*, 9 Johns. Rep. 267.

B. entered into possession under an agreement for a conveyance when the whole of the purchase money should be paid, and in the mean time to pay an annual rent of twenty-five bushels of wheat ; B. having paid rent for one year at least, becomes a tenant, and is entitled to notice to quit. *Jackson ex dem. Livingston vs. Niven*, 10 Johns. Rep. 335.

mortgagor, after the forfeiture of the mortgage, without any previous notice to quit the premises ;(q)[1] and the principle of this seems to be, not that the mortgagor is tenant at will to the mortgagee after the forfeiture ; but that he is then acting as a kind of trustee to the mortgagee, subject to have his authority concluded at the mortgagee's pleasure.(r)

The under lessees of the mortgagor are also liable to be ejected without any notice, provided they have been let into possession by the mort-

(q) *Birch v. Right*, 1 T. R. 376. 88.

(r.) *Moss v. Gallimore*, Doug. 279. 82.

[1] A mortgagor is entitled to notice to quit (of six months) previous to bringing an action of Ejectment by the mortgagee. *Jackson ex dem. Benton vs. Laughhead*, 2 Johns. Rep. 75. (Same Point,) *Jackson ex dem. Carr vs. Green*, 4 Johns. Rep. 186.

But a purchaser from the mortgagee is not entitled to notice, for the relationship of landlord and tenant does not exist between him and the mortgagee. *Jackson ex dem. Simmons vs. Chase*, 2 Johns. Rep. 84. (Same Point,) *Jackson ex dem. Ferris vs. Fuller*, 4 Johns. Rep. 215.

Where a mortgage contains a *Power of Sale*, on default of payment, and the mortgagee proceeds under the power, and gives public notice of the sale of the mortgaged premises for six successive months, pursuant to the Statute, this, in an Ejectment afterwards brought against the mortgagor, will be deemed equivalent to six months notice to quit, previous to the commencement of the suit. *Jackson ex dem. Bennett vs. Lamson*, 17 Johns. Rep. 300.

Though a mortgagor in possession, is entitled to a notice to quit, before an action brought ; yet if he sells the premises absolutely, the purchaser is not entitled to notice to quit. *Jackson ex dem. Barclay & Al. vs. Hopkins*, 18 Johns. Rep. 487.

Offering to show that a mortgage had been paid off and satisfied, is not a waiver of notice to quit. *Ibid.*

An *Assignment* of the mortgage by the mortgagee does not destroy the privity of the estate, or change the condition of the mortgagor's tenancy.—*Ibid.*

A delay of more than four years to bring Ejectment, after notice to quit by a mortgagee to a mortgagor, is not a waiver of the notice. *Jackson ex dem. Beach vs. Stafford*, 2 Cowen's Rep. 547.

The notice to quit by a mortgagee to a mortgagor, need not direct the mortgagor to quit on a day in the year corresponding with the date of the mortgage. *Ibid.*

The mortgagor, in order to warrant Ejectment against him, is not entitled to notice to quit, after foreclosure. At any rate, the advertisement of sale operates as a sufficient notice to quit. *Jackson ex dem. Walsh vs. Colden*, 4 Cowen's Rep. 266.

One who holds of a mortgagor under a parol contract to purchase, is not entitled to a notice to quit. *Jackson ex dem. Roosevelt & Al. vs. Stackhouse*, 1 Cowen's Rep. 122.

gagor, subsequent to the mortgage, and without the privity of the mortgagee, whether they hold as tenants from year to year, or by leases executed after the date of the mortgage. But if a lease be granted by a mortgagor with the concurrence of the mortgagee, or if a mortgagee, with knowledge that the mortgagor has granted a lease, encourage the tenant to lay out money upon the premises, it may admit of doubt, whether by such conduct the mortgagee has not confirmed the lease, or so far at least acknowledged the lessee as his tenant, as to render a notice to quit necessary before he can maintain ejectment against him.<sup>(s)</sup> With respect to tenancies created prior to the mortgage, the situation of the mortgagee is of course the same as that of the mortgagor before the mortgage was made.<sup>(t)</sup> [\*107]

The assignees of the mortgagee have also the like privileges with regard to under-tenants; and the right of an assignee to maintain ejectment without a notice to quit, will not be taken away by a tenancy created prior to the assignment, provided such tenancy commenced subsequently to the date of the mortgage, and continued unacknowledged by the mortgagee.<sup>(u)</sup>

When a party has obtained possession of premises belonging to another, and the owner does any act from which a jury may infer that he intends to acknowledge him as his tenant, a tenancy from year to year is created by such act, and the party will be entitled to a regular notice to quit before he can be ejected.[1] Thus, if a landlord suffer his te-

(s) *Doe, d. Sheppard, v. Allen*, 3 Taunt. 78.

(t) *Warne, d. Keech, v. Hall*, Doug. 21.

*Thunder, d. Weaver, v. Belcher*, 3 East, 449.

*Birch v. Wright*, 1 P. R. 378. *Doe, d. Sheppard, v. Allen*, 3 Taunt. 78.

(u) *Thunder, d. Weaver, v. Belcher*, 3 East. 449.

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[1] If the lessor allows the tenant to remain in possession seventeen years after the expiration of the lease, he cannot recover in Ejectment without notice to quit. *Bedford vs. M<sup>r</sup> Elherron*, 2 Serg & R. Rep. 49.

The owner of the fee granted to A. his partners, fellow adventurers, &c. free liberty to dig for tin and all other metals, through certain lands therein described, and to raise, make merchantable, and dispose of the same to their own use; and to make adits, &c. necessary for the exercise of that liberty, together with the use of all waters and water courses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, and to convey any water course over the premises granted, *Habendum* for twenty-one years; covenant by the grantee to pay one eighth share of all ore to the grantor, and all rates, taxes, &c. and to work effectually the mines during the term, and then, in failure of the performance of any of the covenants, a right of re-entry was reserved to the grant-

nant to continue in possession after the expiration of his lease, and receive rent from him accruing, subsequently to the period of such expiration, he becomes thereby his tenant from year to year, upon the conditions of the original lease. So, also, if a tenant for life make a lease void against the remainder-man, and the lessee enter, and then the tenant for life die, if the remainder-man receive rent from such lessee, accruing subsequently to the death of the tenant for life, such receipt of rent, although it will not amount to a confirmation of the lease,

[\*108] will be sufficient (if the rent \*be adequate to the value of the premises)(v) to establish a tenancy from year to year, upon the terms of it, between the remainder-man and the lessee: and it will be no answer for the remainder-man, that he was ignorant of his title when he received the rent; for it is more reasonable that the remainder-man, who ought to have looked into his title, should be bound by his own act, than that the lessee should be prejudiced by his ignorance.(w) In like manner, when a party is let into possession, under a lease void by the statute of frauds,(x)[1] payment and receipt of rent will not establish the lease, but it will create a tenancy from year to year, regulated by its covenants and conditions.(y) The same principle also holds, if the party come into possession under an agreement or lease, invalid from any other circumstance: as where the party held under an agreement that the lessee should pay a certain rent, and that the lessor should not turn out the lessee so long as the rent was duly paid quarterly, and the lessee did not expose to sale, or sell any article that might be injurious to the lessor in his business, which agreement was invalid, inasmuch as it would (if the tenant complied with the terms thereof) ope-

(v) *Doe, d. Brune, v. Prieaux*, 10 East,

158. *Denn, d. Bruce, v. Rawlins*, 10 East,

261.

(w) *Roe, d. Jordan, v. Ward*, 1 H. Black.

97. *Doe, d. Martin, v. Watts*, 7 T. R. 83.

(x) 29 Car. 2. c. 3.

(y) *Doe, d. Rigge, v. Bell*, 5 T. R. 471.

*Clayton v. Blakey*, 8 T. R. 3.

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or: *Held*, that this deed did not amount to a lease, but contained a mere license to dig and search for minerals, and that the grantee could not maintain an Ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee. *Doe ex dem. Hanley vs. Wood*. 2 Barnew. & Ald. Rep. 724.

[1] Though a parol demise for seven years be void by the Statute of Frauds, yet it enures as a tenancy from year to year, if the tenant enter and hold under it; and it will regulate the terms of the tenancy in other respects; as the rent, the time of year when the tenant must quit, &c.—*Schuyler vs. Leggett*, 2 Cowen's Rep. 660.

rate as an estate for life, which can only be created by deed as a feoffment or conveyance to uses, yet the lessee having been let into possession, and rent having been paid and received, a tenancy from year to year was created thereby. (z)

The same rule prevails when a party is let into possession under a valid agreement for a future lease. As no interest \*in [\*109] the land passes under such an agreement, no tenancy is created thereby; but the party being let into possession, and rent being paid and received, he becomes, as in the cases already mentioned, a tenant from year to year. [1]

It is frequently difficult to determine, from the words of an instrument, whether it will operate as a lease, or only as an agreement for one; and it may be therefore useful, although the subject does not strictly fall within the limits of this treatise, shortly to consider the points which have arisen in cases of this description.

Formerly, when an agreement contained words of present demise, it was held to amount to an absolute lease, although covenants were added, prospective of some further act to be done, such covenants being construed to be merely in further assurance. As where, before the statute of frauds, a party said, "you shall have a lease of my lands in D. for twenty-one years, paying therefor 10s. *per annum*; make a lease in writing, and I will seal it:" this was held a good lease by parol, and the making of it in writing was but a further assurance. (a) So, also, and for a similar reason, the words, *doth let*, in articles of agreement, have been held a present demise, although there was a further covenant, "that a lease should be made and sealed, according to the effect of the articles, before the feast of All Saints next ensuing." (b) But a different principle now prevails. The intention of the parties is alone consider-

(z) *Doe, d. Warner, v. Browne*, 8 East. 166.

(b) *Harrington v. Wise*, Cro. Eliz. 486. Noy, 57.

(a) *Maldon's case*, Cro. Eliz. 33.

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[1] A contract that a person shall occupy a house and put it in repair, and in consideration thereof should enjoy the property at a certain rent until the repairs were reimbursed, makes such person a tenant from year to year, and not liable to Ejectment when the contract is ended, without notice to quit. *Thomas vs. Wright*, 9 Serg. & R. Rep. 87.

ed, and, to use the words of Lord Ch. B. *Gilbert*, "if the most proper form of words of leasing are made use of, yet if, upon the whole, [\*110] there appears no such intent, but that the instru-<sup>\*</sup>ment is only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties, by construing a present lease, when the intent was manifestly otherwise."<sup>(c)</sup> Thus, where articles were drawn up as follows, "A. doth demise his close to S., to have it for forty years," and a rent was reserved with a clause of distress, upon which articles a memorandum was also written "that the articles were to be ordered by counsel of both parties, according to the due form of law:" it was ruled, that the articles were not a sufficient lease.<sup>(d)</sup> So where the words were, "A. doth agree to let, and B. agrees to take," for a certain term, at a certain rent, all his estates, the said B. to enter upon the premises *immediately*, and it was further agreed, that leases with the usual covenants should be made and executed by a certain date; the stipulation that leases should be so drawn, was held to show plainly that it was not the intention of the parties that such agreement, although containing words of present demise, should operate as a lease, but only to give the defendant a right to the immediate possession till a lease could be drawn.<sup>(e)</sup> So, also, where, upon an agreement stamp, A. agreed to demise and let certain copyhold premises, for a certain term, at a certain rent, and *further undertook to procure a license to let* such premises, the court held, that the instrument was an executory agreement only, for two reasons; first, because, if it were held to be a lease, a forfeiture would be incurred, which would be contrary to the intent of the parties, who had cautiously guarded against it, by the insertion of a covenant, that a license to [\*111] lease should be procured from the lord; and, se-<sup>\*</sup>condly, because the stamp was conformable to the nature of an agreement for a lease, and not adapted to an absolute lease.<sup>(f)</sup> So, also, where the words were, "that the said mills he shall hold and enjoy, and I engage to give a lease in, for a certain term," &c. it was ruled, that the words, "shall hold and enjoy," would have operated as words of present demise, if they had not been controlled by those which followed.<sup>(g)</sup> So, also, where the words were, "agreed this day to let my

(c) *Enc. Ab. tit. Leases*, 164—*Baxter*, d.  
*Marshall v. Brown*, 2 Black. 978—4.

(d) *Sturgeson v. Painter*, Noy, 128.

(e) *Goodtitle, d. Estwick, v. Way*, 1 T. R.  
 739.

(f) *Doe, d. Coppe, v. Clare*, 2 T. R. 789.

(g) *Roe, d. Jackson, v. Ashburner*, 5 T. R.  
 168.

house to B.," for a certain term, "a clause to be added in the lease, to give my son a power," &c. it was considered to be manifest, from the latter words, that a future instrument of demise was contemplated.<sup>(h)</sup> And, in a late case, where, in an instrument which contained words of present demise, there was no direct reference to any future lease, but it appeared, upon taking the whole instrument together, that a future lease was intended, the same rule of construction prevailed. In this latter case the agreement was, "A. agrees to let to B. all his farm, &c. (except three pieces of land,) to hold for twenty-one years, determinable at the end of the first fourteen, at the yearly rent of 26l. payable, &c. and at and under all other usual and customary covenants and agreements, as between landlord and tenant where the premises are situate:—A. to allow a proportionate part of the rent, for the three pieces of land above excepted;" and the court held, that it amounted only to an agreement for a lease for the following reasons: because, "at the yearly rent, &c." and, "at and under all usual covenants, &c." is not the language in which a lawyer would introduce into a lease \*the [\*112] technical covenant for further assurance, but contemplates the entire making of an original lease: and because no landlord or tenant of common sense would enter on a term for twenty-one years, without ascertaining what were the terms on the one side and the other, by which they were to be bound for that period, and what was to be the rent apportioned for the excepted premises.<sup>(i)</sup> But where an instrument, upon an agreement stamp, was as follows, "A. agrees to let, and B. agrees to take, all that land, &c. for the term of sixty-one years from Lady-day next, at the yearly rent of 120l.; and for and in consideration of a lease to be granted by the said A. for the said term of years, the said B. agrees to expend 2,000l. in building, within four years, five houses of a third class of building; and the said A. agrees to grant a lease or leases of the said land, as soon as the said houses are covered in, and the said B. agrees to take such lease or leases, and execute a counterpart, or counterparts thereof:—*this agreement to be considered binding, till one fully prepared can be produced*;" the court held the same to be a lease, considering it to be the intention of the parties, that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a present legal interest in the term, which was to be binding upon both parties; although,

(h) *Doe, d. Bromfield, v. Smith*, 6 East, 380.

(i) *Morgan, d. Doring, v. Bissell*, 3 Taunt. 65.



when a certain progress was made in the buildings, a more formal lease or leases, in which, perhaps, the premises might be more particularly described, for the convenience of underletting or assigning, might be executed. (j) So, also, where the instrument was, "A. agrees to let, and also, upon demand, to execute, to B. a lease of certain lands, and B. agrees to take, and \*upon demand, to execute [ \*113 ] a counterpart of a lease of the said lands for a certain term, at a certain rent ; the lease to contain the usual covenants, and the agreement to bind until the said lease be made and executed," &c. it was held to be a present demise ; and that the agreement for a future lease, with further covenants, was for the better security of the parties. (k)

[ \*114 ] \*But to return to the subject of implied tenancies from year to year. In all the cases already mentioned, the mode of acknowledging the tenancy was by the payment and receipt of rent, which, indeed, is the common evidence in cases of this nature. But the intention to create such a tenancy may be inferred from other circumstances. Thus, where lands descended to an infant, with respect to whom the tenant in possession was a trespasser, and an ejectment was brought on the demise of the infant, and compromised by his attorney upon certain terms, one of which was, that the tenant should attorn to the infant, it was ruled by Lord Kenyon, C. J. at *Nisi Prius*, upon a second ejectment being brought by the infant, when he attained his full age, that although the infant was no party to the agreement, nor had confirmed it, nor received rent since he came of age, yet that such agreement having been entered into, without fraud or collusion, after an ejectment brought at his suit, had, by his acquiescence therein, established the defendant's title as against himself, and created a new tenancy, which could only be determined by a notice to quit. (l) So, also, where a *feme covert* lived many years separated from her husband, and during that time received to her separate use the rents of certain lands, which came to her by devise after separation, it was presumed, that she received the rents by her husband's authority, and held, that a notice to quit must be given by him before he could maintain ejectment. (m)

But it is necessary that some act of acknowledgment should [ \*115 ] take place ; a mere permission by the owner to occupy the premises will not be sufficient, under any circumstances, to

(j) *Poole v. Bentley*, 12 East, 168.

(l) *Doe, d. Miller, v. Noden*, 2 Esp. 528.

(k) *Doe, d. Walker, v. Groves*, 15 East.

(m) *Doe, d. Leicester, v. Biggs*, 1 Taunt.

create a tenancy requiring a notice to quit,[1] although, in some instances, as we have already remarked, it may create a tenancy at will.(n)

\*Thus where the party was let into possession, under an [\*116] agreement for the purchase of the land, and had possession formally given to him, and paid part of the purchase money, the court held, that the premises might be recovered in ejectment, upon a demand of possession, without any notice to quit.(o)[1] And where the vendor of a term, after payment of part of the purchase money, let the purchaser into possession upon an agreement, that he (the purchaser) should have possession of the premises until a given day, paying the reserved rent in the meanwhile, and that if he should not pay the residue of the purchase money on that day, he should forfeit the instalments already paid, and not be entitled to an assignment of the lease; it was held, that the vendor might maintain ejectment without notice to quit, or even demand of possession, the purchaser having failed to complete the purchase at the appointed day.(p) So, also, where the party took possession \*under an agreement that the owner [\*117] would, by indenture, demise, &c. this was holden to be a mere permissive occupation, until the execution of the indenture.(q) And where a man, having obtained possession of a house without the landlord's privity, afterwards entered into a negotiation with him for a lease, which failed, the same rule of construction prevailed.(r) In like manner, where a tenant whose lease had expired continued in possession, pending a treaty for a further lease, no tenancy from year to year was

(n) *Ante*, 103, 104.

(q) *Hegas v. Johnson*, 2 Taunt. 148.

(o) *Right, d. Lewis, v. Beard*, 13 East, 210.

(r) *Doe, d. Knight, v. Quigley*, 2 Campb. 505.

(p) *Doe, d. Leeson, v. Sayer*, 3 Campb. 8.

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[1] Notice to quit is not necessary where there is no tenancy in fact, and especially where the defendant disclaims to hold as tenant. *Jackson ex dem. Haverly & Ux. vs. French*, 3 Wend. Rep. 337.

[1] So where the party being already in the occupation of the land, enters into a contract for the purchase of it, pays part of the purchase money, but fails to fulfil his contract, he is not entitled to notice to quit, before Ejectment brought. *Whiteside & Al. vs. Jackson*, 1 Wend. Rep. 418.

Where the Vendee enters into possession under a contract of purchase with the consent of the Vendor, an Ejectment may be maintained by the Vendor against the Vendee without a previous notice to quit. *Jackson ex dem. Church vs. Miller*, 7 Cowen's Rep. 747. *Smith vs. Stewart*, 6 Johns. Rep. 46, 49.

created by such possession and negotiation, although it was held, that the landlord had so far thereby acknowledged the defendant as his tenant, as to preclude him from recovering in ejectment, upon a demise anterior to the termination of the treaty.<sup>(s)</sup> When, also, a party is admitted into possession under an invalid lease or agreement, no notice to quit is necessary, until the landlord has acknowledged the tenancy, although, in these cases, also, the party becomes tenant at will to the landlord, and cannot be ejected until the landlord has demanded possession, or in some other manner determined the will.<sup>(t)</sup>

As, however, the implied tenancies from year to year here treated of, depend wholly upon the presumption that it was the intention of the parties to create them, evidence may always be received to rebut such presumption, and shew their real meaning. Thus, where a remainderman, on the death of the tenant for life, gave notice to the tenant in possession under a lease, granted by the tenant for life, but void [ \*118 ] against the remainderman, to quit at the end of \*six months, and subsequently to the giving of the notice, but before its expiration, received a quarter's rent, accruing after the death of the tenant for life, it was ruled by *Blackstone, J.*, that the previous notice to quit rebutted the presumption of a tenancy from year to year, raised by the acceptance of the rent.<sup>(u)</sup> So, also, where the rent is not paid and received, as between landlord and tenant, but upon some other consideration, no tenancy from year to year will be created, nor will a notice to quit be necessary. The payment of a customary rent for copyhold premises has been held to be a payment of this nature; and, if the tenant hold such premises by a title or tenure, which is not supported by the custom of the manor, the receipt of the quit-rent from him by the lord will not create a tenancy from year to year.<sup>(v)</sup>

Upon the same principle, where a tenant in tail received an ancient rent, which was but trifling when compared with the real value of the premises, and which had been reserved under a void lease granted by the tenant for life under a power, upon a special case reserved for the

(s) *Doe d. Hollingsworth, v. Stennett*, 2 Esp. 716.

(t) *Goodtitle, d. Herbert, v. Galloway*, 4 T. M. 680. *Clayton, v. Blakey*, 8 T. R. 3. *Thunder, d. Weaver, v. Belcher*, 3 East, 449,

451. *Doe, d. Warner, v. Browne*, 3 East, 165.

(u) *Sykes, d. Murgatoyd v. —*, cited in *Right, d. Fowler, v. Darby*, 1 T. R. 161.

(v) *Right d. Dean of Wells, v. Bawden*, 3 East, 260

opinion of the Court of King's Bench, they intimated that a jury should be strongly advised not to imply a tenancy from year to year from such payment and receipt,<sup>(w)</sup> although, in a subsequent case upon the same title, they were of opinion that it amounted to an acknowledgment of a tenancy at will.<sup>(x)</sup>

If the tenant set his landlord at defiance, and do any act disclaiming to hold of him as tenant; [1] as, for instance, if he \*at- [\*119] torn to some other person, no notice to quit will be necessary; for, in such case, the landlord may treat him as a trespasser.<sup>(y)</sup> It has, however, been held, that a refusal to pay rent to a devisee under a contested will, accompanied with a declaration, that he (the tenant) was ready to pay the rent to any person who was entitled to receive it, was not a disavowal sufficient to dispense with the necessity of a regular notice.<sup>(z)</sup> [1]

When a tenant from year to year dies, his interest in the land vests in his personal representative, who will continue to hold the premises upon the same terms as the original tenant, and be entitled to the same notice to quit.<sup>(a)</sup> If, however, by the terms of the agreement, no interest vests in the representative, no notice to quit can be necessary. Thus, where *A.* agreed to demise a house to *B.*, during the joint lives of *A.* and *B.*, and *B.* entered in pursuance of the agreement, and, before any lease was executed, died, after which *B.*'s executor took possession of

(w) *Roe, d. Bruns, v. Prideaux*, 10 East, 158.

(x) *Denn, d. Bruns, v. Rawlins*, 10 East, 261.

(y) *B. N. P.* 96.

(z) *Doe, d. Williams, v. Pasquali*, Peake's R. 196.

(a) *Doe, d. Shore, v. Porter*, 8 T. R. 13.

[1] A person claiming to hold land in fee is not entitled to notice to quit. *Jackson ex dem. Whitbeck & Al. vs. Deyo*, 3 Johns. Rep. 422.

A disclaimer by the tenant, dispenses with the necessity of a notice to quit. *Jackson ex dem. Locksell & Al. vs. Wheeler* 6 Johns. Rep. 272.

[1] Defendant who held under a tenant for life, received on the death of tenant for life, a letter from the lessor of the plaintiff claiming as heir and demanding rent. Defendant answered, that he held the premises as tenant to *S.*; that he had never considered lessor of plaintiff as his landlord; that he should be ready to pay the rent to any one who should be proved to be entitled to it, but that without disputing the lessor of the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim, without more satisfactory proof in a legal manner. *Held*, that this was a disclaimer of lessor of plaintiff's title. *Doe ex dem. Calvert vs. Frowd*, 4 Bingham. Rep. 557.

the house; it was held, that *A.* might maintain ejectment against the executor without notice to quit, because the death of *B.* determined his interest, and consequently no interest vested in the executor. The court were also of opinion that the case would have been the same if the lease had been executed.(b)

[ \*120 ] \*In like manner the situation of a tenant from year to year remains unaltered, notwithstanding the death of the landlord, and he will be entitled to his regular notice to quit, whether the lands descend to the heir (although such heir be a minor,(c) ) or pass to the personal representative, or devisee of the deceased.

We are next to consider the persons by whom, and to whom, the notice to quit is to be given.[1]

The notice to quit must be given by the person interested in the premises, or his authorized agent; and such agent must be clothed with his power to give the notice, at the time when the notice is given; a subsequent assent on the part of the landlord being not sufficient to establish by relation a notice, given in the first instance without his authority. And this principle is founded in reason and good sense, for as the tenant is to act upon the notice at the time it is given to him, it ought to be such an one as he may act upon with security; and if an authority by relation were sufficient, the situation of the tenant must remain doubtful, until the ratification or disavowal of the principal, and he would thereby sustain a manifest injustice.(d)

When also two or more persons are interested in the premises, a notice to quit given by one, on behalf of himself and co-tenants, will be

(b.) *Doe, d. Bromfield, v. Smith*, 6 East, 580.

(d) *Right, d. Fisher, v. Cuthell*, 5 East, 491.

(c) *Maddon, d. Baker, v. White*, 2 T. R. 159.

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[1] *A.* demised premises to *B.* for one year certain; it was agreed that after the expiration of that year, the tenancy should expire, on three months notice being given by *A.* The agreement contained no clause of re-entry. *B.* entered and took receipts for the rent from *A.*, first, in his own name alone, and, afterwards in the names of himself and two others, who were his partners. After three years possession he received notice to quit from *A.* alone: Held, that *A.* might recover on his own demise in an Action of Ejectment, the notice to quit from *A.* alone being sufficient to determine the tenancy. *Doe ex dem. Green & Al. vs. Baker*, 8 Taunt. Rep. 241.

valid only as far as his own share is concerned.(c) unless he was acting at the time under the authority of the other parties mentioned in the notice. And this rule holds, notwithstanding that the parties are interested as joint tenants ;[1] for the rule of law, that [\*121] every act of one joint tenant, which is for the benefit of his co-joint tenant, shall bind him, does not apply, inasmuch as it cannot be predicated that the determination of a tenancy is for his benefit.(d) But where several parties are so interested, as many of them as give notices may recover their respective shares,(e) although the others do not join, unless, indeed, by the conditions of the tenancy, it is rendered necessary for all the parties to concur in the notice ; in which case a notice given by some of the joint tenants, without the junction or authority of their companions, will be altogether invalid.(d)

The steward of a corporation may give a notice to quit, without a power under the corporation seal for so doing ; and if the corporation afterwards bring an ejectment upon such notice, it will not be necessary to give any other evidence of his authority, than that he is steward ; for the corporation, by bringing the ejectment, shew that they authorize and adopt the act of their officer.(f)

A receiver appointed by the Court of Chancery, with a power to let the lands, is an agent sufficiently authorized to give a notice to quit ; for if he have an authority to let, he must be taken to have a power of determining the letting, as he must determine for how long he will let.(g)

Where a lease contained a proviso, that if either of the parties should be desirous to determine it, in seven or four-teen [\*122] years, it should be lawful for either of them, *his executors, or*

(d) *Right d. Fisher, v. Cuthell*, 5 East, 491.

(e) *Doe, d. Whayman, v. Chaplin*, 3 Taunt. 120.

(f) *Roe, d. Dean of Rochester, v. Pierce*, 2 Campb. 96.

(g) *Wilkinson v. Colley*, Barr. 2394. *Doe, d. Marsack, v. Read*, 12 East, 57, 61.

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[1] To entitle joint tenants to recover in ejectment against a Tenant from year to year, the notice to quit must be signed by all the joint tenants at the time it is served ; but if the notice be given by an agent, it is sufficient, if his authority be subsequently recognized ; and therefore where such notice was given by an agent under a written authority, which at the time of the service of the notice had been signed only by some of the several joint tenants, but afterwards was signed by all the others : *Held*, that the subsequent recognition was sufficient to give validity to the authority from the beginning, and that the notice to quit was therefore sufficient. *Goodtitle ex dem. King vs. Woodward*, 3 Barnew. & Ald. Rep. 689.

administrators, so to do upon twelve months' notice to the other of them, his heirs, executors, or administrators, it was considered that the words *executors or administrators*, were put for *representatives in general*, and that a notice might be given by *an assignee* of either party, or by *the heir or devisee*, as well as by the parties themselves, their executors or administrators; because otherwise, in case of an assignment, or devise, the right of determining the term would be taken from the person interested in it, and given to a mere stranger, having no interest therein. (h) But, where the demise was for twenty-one years, if both parties should so long live, but if either should die before the end of the term, then the heirs and executors &c. of the parties so dying, might determine the lease by giving twelve months' notice to quit, it was holden, that this power extended only to the representatives of the party dying, and that the lease could not be determined by a notice to quit given by the lessor, after the lessee's death, to his representative. (i)

When the relation of landlord and tenant subsists, difficulties can seldom occur as to the party upon whom the notice should be served. The service should invariably be upon the tenant of the party serving the notice, notwithstanding a part, or even the whole of the premises, may have been under-let by him. [1] And in a case where the

[\*123] \*service was upon a relation of the under-tenant upon the premises, Lord Ellenborough, C. J. ruled the service to be insufficient, although the notice was addressed to the original tenant. (j) The original tenant is also liable to an ejectment, at the expiration of the notice, for the lands in the possession of his under-tenants, although he may, on his part, have given proper notices to them, and delivered up such parts of the premises as were under his own controul. (k)

Where a tenant from year to year had under-let part of the premises, and then gave up to his landlord the part remaining in his own possession, not having received from him a notice to quit, or surrendering

(h) *Roe, d. Bamford, v. Hayley*, 12 East, 464.

(i) *Legg, d. Scott, v. Etnion*, Willes, 43.

(j) *Doe, d. Mitchell, v. Levi*, M. T. 1811. M. S.

(k) *Roe v. Wiggs*, 2 N. R. 830. *Pleasant, d. Hayton, v. Brinson*, 14 East, 234.

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[1] Notice to quit, given by the lessor to his immediate lessee, who has continued to pay him his annual rent, is sufficient, though another person is in possession of the premises. *Jackson ex dem. Livingston vs. Baker*, 10 Johns. Rep. 270.

such part in the name of the whole, it was held that a notice to quit, from the original landlord to the sub lessee, for the part so under-let was irregular; and that the sub-lessee could not be ejected without a regular notice from his immediate landlord. And it seems, that if the tenant had surrendered such part in the name of the whole, it would not have varied the case, because the surrender of the lessee would not destroy any interest, which a stranger claiming under him had acquired in the term before such surrender.

When the premises are in the possession of two, or more, as joint tenants, or tenants in common, a written notice to quit, addressed to all, and served upon one only, will be a good notice; <sup>(l)</sup> so also a parol notice given to one co-tenant only will bind his fellow. <sup>(m)</sup>

\*When a corporation aggregate is the tenant, the notice <sup>[\*124]</sup> should be addressed to the corporation, and served upon its officers, and a notice addressed to the officers will not be sufficient. <sup>(n)</sup>

With respect to the mode of serving the notice, it is in all cases advisable, if possible, to deliver the same to the tenant personally; but if personal service cannot be effected, the notice should be left at his usual place of residence, whether the same be situated upon the demised premises, or elsewhere. <sup>(o)</sup>

It is, however, doubtful from the judgment of *Buller, J.* in the case above cited, whether the delivery of a notice to quit at the dwelling house of the tenant will be sufficient service, provided the person to whom it is delivered should swear upon the trial, that no intimation thereof had ever been given to the tenant in possession. It is much to be regretted that a point of such general importance to landlords and tenants should not be more clearly settled.

Next of the form of the notice. <sup>(p)</sup>

When the landlord intends to enforce his claim to double value, if the tenant holds over, <sup>(q)</sup> it is necessary that the notice to quit should be in writing; but for the purposes of an ejectment a parol notice is suffi-

<sup>(l)</sup> *Doe, d. Lord Bradford, v. Watkins*, 7 East, 551.

<sup>(m)</sup> *Doe, d. Lord Macartney, v. Crick*, 5 Esp. 136.

<sup>(n)</sup> *Doe, d. Lord Carlisle, v. Woodman*, 8 East, 228.

<sup>(o)</sup> *Jones, d. Griffiths, v. Marsh*, 4 T. R. 464.

<sup>(p)</sup> Appendix, Nos. 1, 2, 3.

<sup>(q)</sup> 4 G. II. c. 28. s. 1.



cient, unless the notice is required to be in writing by express agreement between \*the parties.(r) It is, however, nevertheless, the general practice to give written notices; and it is a precaution which should always, when possible, be observed, as it prevents mistakes, and renders the evidence certain and correct. It is customary also to address the notice to the tenant in possession; and it is, perhaps, most prudent to adhere to this form, though, if proof can be given that the notice was served personally upon him, it is thereby rendered unnecessary.(s) And where a notice was addressed to the tenant by a wrong Christian name, and the tenant did not return the notice, or object to it, and there was no tenant of the name mentioned in the notice, it was ruled at Nisi Prius to be sufficient.(t)

A subscribing witness to a notice to quit is unnecessary; and it is prudent not have one, as it may occasion difficulties in the proof of the service, and cannot be of the slightest advantage to the landlord.

Care should be taken that the words of a notice are clear and decisive, without ambiguity, or giving an alternative to the tenant; for, although the courts will reluctantly listen to objections of this nature, yet if the notice be really ambiguous, or optional, it will be sufficient to render it invalid, as far at least as the action of ejectment is concerned.

[ \*126 ] The notice, however, will not be invalid, unless it contain a real and *bona fide* option, and not merely an apparent one; for if it appear clearly, from the words of the notice, that the landlord had no other end in view, than that of turning out the tenant, it will be deemed a notice sufficient to found an ejectment upon, notwithstanding an apparent alternative. Thus, the words, "I desire you to quit the possession at Lady-day next of the premises, &c. in your possession, or *I shall insist upon double rent*," have been held to contain no alternative; because the landlord did not mean to offer a new bargain thereby, but only added the latter words as an emphatical way of enforcing the notice, and shewing the tenant the legal consequences of his holding over. It was contended for the tenant, that this could not be the construction of the notice, because the statute of 4 Geo. II. c. 28. does not give double the

(r) *Legg, d. Scott, v. Benion*, Willea, 43.  
*Timmins v. Rowlinson*, 1 W. Blk. 588. *Doe*,  
*d. Ld. Macartney, v. Crick*, 5 Esp. 196. *Roe*,  
*d. Dean of Rochester, v. Pierce*, 2 Campb.  
 96.

(s) *Doe, d. Matthewson, v. Wrightman*, 4  
 Esp. 5.

(t) *Doe, v. Spiller*, 6 Esp. 70.

rent, but double the *value*, on holding over; but Lord *Mansfield*, C. J., was of opinion, that the notice, notwithstanding this variance, clearly referred to the statute. It seems, however, that if the words had been "or else that you agree to pay double rent," the notice would have been an alternative one.(u)

Where the notice was to quit "on the 25th day of March, or 6th day of April next ensuing,"(v) and was delivered before new Michaelmas-day, it was held to be a good notice; as being intended to meet an holding commencing either at new, or old Lady-day, and not to give an alternative.(w)

\*Upon the same principle, the court will not invalidate a [\*127] notice, on account of an ambiguity in the wording of it, provided the intention of the notice be sufficiently certain. Thus, an impossible year has been rejected. The notice was given at Michaelmas 1795, to quit at Lady-day, *which will be* in 1795, and was accompanied, at the time of the delivery to the tenant, with a declaration, that as he would not agree to the terms proposed for a new lease, he must quit *next* Lady-day, and under these circumstances the notice was considered to be sufficiently certain:(x) the court also seemed to be of opinion, that the notice would have been good without the accompanying declaration, the words "*which will be*," manifestly referring to the then next Lady-day.—In like manner, where there was a mis-description of the premises in the notice, which could lead to no mistake, the house being described therein as the *Waterman's Arms*, instead of the *Bricklayer's Arms*, no sign called the *Waterman's Arms* being in the parish, the notice was deemed a valid one.(y)

When a notice is given to quit at Michaelmas, or Lady-day generally, it will not be deemed an ambiguous notice, but considered *prima facie*, as expiring at *new* Michaelmas, or *new* Lady-day, open, however, to explanation, that *old* Michaelmas, or *old* Lady-day, was intended. And if it appear, that the customary holdings where the lands lie, are from old Michaelmas, or Lady-day, or even that in point of fact, the tenant enter-

(u) *Doe d. Matthews, v. Jackson*, Dougl. 176.

(v) In the printed report, this date is stated to be the eighth day of April, which, from the reasoning in the case, cannot be correct.—See also *Doe d. Spicer v. Lea*, 11 East, 312.

(w) *Doe d. Mattheewson, v. Wrightman*, 4 Esp. 5.

(x) *Doe, d. Duke of Bedford, v. Kightley*, 7 T. R. 63.

(y) *Doe, d. Cox, v. —*, 4 Esp. 185.

ed at old Michaelmas, or Lady-day, although no such custom exist, such a notice will be binding upon him.(z)

[ \*128 ] \*The notice must include all the premises held under the same demise; for a landlord cannot determine the tenancy as to part of the things demised, and continue it as to the residue. But where the demise was of land and tithes, and the notice was to quit possession of "all that messuage, tenement, or dwelling house, farm-lands, and premises, with the appurtenances, which you rent of me," it was ruled at *Nisi Prius* that this notice was sufficient to include the tithes; for the tithes being held along with the farm, the notice must have been understood by both parties to apply to both.(a)

Fourthly, Of the time when the notice should expire.

Before, however, we enter upon this subject, it may be useful to observe, that certain demises, which have the appearance of tenancies from year to year only, are considered by the courts as conveying to the tenant an indefeasible interest for a certain time, though afterwards liable to be determined by a notice to quit.

Thus, a demise "not for one year only, but from year to year," has been held to constitute a tenancy for two years at least, and not determinable by a notice to quit at the expiration of the first year.(b) The same interpretation has also been given to a demise "for a year, and afterwards from year to year;"(c) though where the demise was "for twelve months certain, and six months' notice afterwards;" it was held at *Nisi Prius*, that the tenancy might be determined at the expiration of the first twelve months.(d)

[ \*129 ] \*Where the demise was to hold for three, six, or nine years, generally, without any stipulation as to the manner in which, or the party by whom, the tenancy might be determined at the end of the third, or sixth year, the tenancy was held to be determinable, at the two earlier periods, at the will of the tenant only, and by a regular notice to quit; and that, as against the landlord, the demise operated as an indefeasible one for nine years.(e)

(z) *Furley, d. Mayor of Canterbury, v. Wood*, 1 Esp. 197. *Doe d. Hinde, v. Vince*, 2 Campb. 256.

(a) *Doe d. Morgan, v. Church*, 3 Campb. 71.

(b) *Denn d. Jacklin, v. Cartright & East*, 31.

(c) *Birch, v. Wright*, 1 T. R. 373. 80. and the cases there cited.

(d) *Thompson, v. Maberly*, 2 Campb. 573.

(e) *Denn v. Spurrier*, 3 B. & P. 389.

If the produce of the demised lands require two years to come to perfection, as if it be liquorice, madder, &c. a general holding will, it seems, enure as a tenancy from two years to two years, and cannot be determined by a notice to quit at the end of the first or third year.(f) And it was observed by *De Grey*, C. J. in his judgment, that it might deserve to be considered whether, if required by the nature of the soil, or the course of husbandry, a general holding will not always enure as a tenancy for such period, as may be necessary to carry the land through its regular course of cultivation, instead of as a tenancy from year to year; but this doctrine seems very doubtful.

It has before been stated generally, that, by the common law, the notice necessary to be given to a tenant, is a notice for *half a year*, expiring at the end of the current year of his tenancy; and that a notice expiring at any other period will not be sufficient.(g) This notice is frequently spoken of in the books, as a *six months' notice*; and the distinction seems to be, that when the tenancy expires at any of the usual feasts, as Michaelmas, Christmas, Lady-day, or Midsummer, the notice must be given prior to, or \*upon, the cor- [\*130] responding feast happening in the middle of the year of the tenancy;(h) whilst, if it expire at any other period of the year, the notice must be given six calendar months previous to such expiration.

The notice, when a tenancy commences at any of the usual feasts, may be given to quit at the end of half a year, or of six months from the date of the corresponding feast in the middle of the year, without stating the day when the tenant is to quit, although the intermediate time be not exactly half a year, or six months, from feast to feast being the usual half yearly computation. And, indeed, in a case where the notice was, to quit "on or about the expiration of six *calendar* months from the 29th of September," (the tenancy commencing March 25,) the court ruled the word *calendar* to be surplusage, and held the notice good.(i)

(f) *Roe v. Lees*, Black. 1171.

(g) *Ante*, 103.

(h) In a report of a MS. case in Esp. N. P. 400. it is said, that a notice given on the 30th of September, being the day after Michaelmas-day, to quit at Lady-day following, was ruled by *Heath*, J. to be a sufficient notice. Some particular circumstances not noticed by the reporter, must, it is conceived,

have occasioned Mr. J. *Heath's* decision, since the principle laid down in the report is in opposition to every authority upon the subject. Probably the tenant entered at old Lady-day.—*Vide Right, v. Darby*, 1 T. R. 150. *et ante*, 127.

(i) *Howard v. Wamsley*, 6 Esp. 53. The marginal note in the report of this case is incorrect.

It was once contended, that the principle, that a notice to quit must expire at the end of the year of the tenancy, did not extend to houses as well as lands; and that in cases where houses alone were concerned, six months' notice, at any period of the year, would be sufficient; but the court considered that the same inconvenience might arise in the one case as in the other, since the value of houses varies considerably at different periods of the year; and therefore held that the [\*131] tenant of a house was entitled to the same privileges, with respect to the notice to quit, as the occupier of land.(j)

It should, however, be observed, that this rule extends, with respect to houses, to those cases only in which the tenancy enures as a tenancy from year to year; and that the notice required will refer to the original letting, and be regulated by the local custom of the district in which the house is situated, whenever it happens that a shorter term than twelve months is intended to be created by the letting, although no particular period be mentioned.[1] This chiefly happens in the case of lodgings; and the custom, for the most part, requires the same space of time for the notice, as the period for which the lodgings were originally taken; as a week's notice when taken by the week, a month's when taken by the month, and so forth.(k)[2]

When, also, the custom of the country where the premises are situated, requires, or allows, a notice for a longer, or shorter period, than half a year (as, for instance, the custom of London, by which a tenant, under the yearly rent of 40s. is entitled to a quarters notice only,(l)) the

(j) *Right v. Darby*, 1 T. R. 159. *Doe, d. Browne, v. Wilkinson*, Co. Litt. 270(b), n. 1.

(k) *Doe, d. Parry, v. Hazell*, 1 Esp. 94.  
(l) *Tyley v. Seed*, Skin. 649.

[1] The "*Revised Statutes*," Part 2, Chap. 1, Tit. 4, §1, (*Vol. 1, p. 744.*) contain the following provision relative to the City of New-York:

"§ 1. Agreements for the occupation of lands or tenements, in the city of New-York, which shall not particularly specify the duration of such occupation, shall be deemed valid until the first day of May next after the possession under such agreement shall commence, and the rent under such agreement shall be payable at the usual quarter days for the payment of rent in the said city, unless otherwise expressed in the agreement."

[2] *Quare*. Whether, according to the provisions of the "*Revised Statutes*," Part 2, Chap. 1, Tit. 4, §§ 7, 8, 9, 10 & 11, (*Vol. 1, pp. 745, 746.*) one month's notice is not sufficient in every case? *Vide ANTE, Page 101, n. [1]*

custom will be admitted by the courts; (m) but such custom must be strictly proved, and the witnesses must not speak to *opinion*, but *facts*. (n) The parties may also, by special agreement, vary the time of the duration of the notice; but the notice must, notwithstanding where the letting is from year to year, expire with the year of the tenancy, unless the agreement also provides some other \*period for its expiration. [ \*132 ] (o) Where, however, the terms of the agreement are not intended to create a tenancy from year to year, determinable at a quarter's notice, but to empower the parties to put an end to the tenancy at other periods of the year, as well as at its termination, the courts will give effect to it. Thus, a demise for one year only, and then to continue tenant afterwards, and quit at a quarter's notice; (o) and a demise, where it was agreed "that the tenant was always to be subject to quit at three months' notice," (p) have been held to be demises determinable at the end, although not in the middle of any quarter. But a quarterly reservation of rent is not a circumstance from which an agreement to dispense with a regular notice for six months is to be inferred; although, where the landlord accepted in such case a three months' notice from his tenant, without expressing either his assent to, or dissent from, such notice, it was ruled at *Nisi Prius* to be presumptive evidence of an agreement, that three months' notice should be sufficient. (q)

The notice may be given to quit upon a particular day, or in general terms at the end and expiration of the current year of the tenancy, which shall expire next after the end of one half year from the service of the notice. (r) The latter form should always be used when the landlord is ignorant of the period when the tenancy commenced, and is unable to serve the tenant personally; and, it is also the preferable form, when the commencement of the tenancy is known, as it provides against any misapprehension of the exact day when the tenant entered. If a particular day be mentioned in the notice, it must [ \*133 ] be the day of the commencement, and not of the conclusion of the tenancy; for the tenant cannot be compelled to quit, whilst his right of possession continues, and this right is not determined, until the

(m) *Roe, d. Brown, v. Wilkinson, Co. Litt.* 270(b), n. 1.

(n) *Roe, d. Henderson, v. Charnock, Peake* N. P. C. 4.

(o) *Doe, d. Pitcher, v. Donovan*, 1 Taunt. 555.

(p) *Kemp v. Derrett*, 3 Camp. 511.

(q) *Shirley v. Newman*, 1 Esp. 266.

(r) Appendix, No. 1, 2, 3.

year is fully completed. It must also be the *exact* day of such commencement. The next, or any subsequent day, will not be sufficient.(s)

The time, when a tenancy from year to year commences and expires, takes its date, in the absence of all other circumstances, from the time when the tenant actually enters upon the demised premises ;(t) but this general rule may be varied, both as to the commencement and expiration of the tenancy, either by express agreement or legal inference.

When a person is let into possession as a yearly tenant, and afterwards takes a lease of the premises, and continues to hold the land after the lease has expired, the time of the expiration of the tenancy, created by such holding over, will be regulated by the terms of the lease, and not by the time of the original entry. Thus, if a man enters at Lady-day, continues tenant for one or more years, then accepts a lease for a certain term expiring at Michaelmas, and afterwards holds over and pays rent, the notice must be given to quit at Michaelmas, and not at Lady-day.(u) And the rule extends to the assignees of the original lessee, and their assigns. Whatever may be the period of the year when they enter upon the demised premises, the time of the expiration [ \*134 ] \*of their tenancies will be the same as if the original lessee had continued in possession ; and it seems immaterial whether they come into possession before or after the expiration of the lease.(v)

In like manner, when a remainder-man receives rent from a person in possession under a lease, granted by the tenant for life, but void against the remainder-man, and thereby creates a tenancy from year to year, the time at which a notice to quit, given by such remainder-man, must expire, will be regulated by the terms of the lease, and not by the time of the death of the tenant for life.(w) As, if the lease be for a certain number of years, to commence on the 5th of April, and the tenant for life die on the 30th of September, the proper period for the expiration of the notice will be the 5th of April.

The principle is the same if the tenant hold under a parole lease, void by the statute of frauds. As, where there was a verbal agreement to hold for seven years, and the tenant was to enter at Lady-day, and quit

(s) *Doe, d. Spicer, v. Lea*, 11 East, 312.

(t) *Kemp v. Derrett*, 3 Campb. 511.

(u) *Doe, d. Spicer, v. Lea*, 11 East, 312.

(v) *Doe, d. Castleton, v. Samuel*, 5 Esp.

(w) *Doe, d. Collins, v. Weller*, 7 T. R. 478

*Right, d. Flower, v. Darby*, 1 T. R. 159.

*Roe, d. Jordan, v. Ward*, 1 H. Blk. 87. *Ante*,

107, 108.

at Candlemas, it was held that the lease, although void as to its duration, nevertheless regulated the terms of the tenancy in other respects, [1] and that a notice to quit must expire at Candlemas, and not at Lady-day.(x)

It may be recollected from these cases, that if there be a lease for years, commencing on one day, and terminat-\*ing on an- [\*135] other, as for example, commencing at Lady-day, and terminating at Michaelmas, a tenancy created by the landlord's receipt of rent after the expiration of the lease, will be held to commence at Michaelmas, and to require half a year's notice from Lady-day.

No new tenancy is created by a mere agreement between a landlord and tenant, for an increase of rent in the middle of the year of a tenancy; but a notice to quit, given after the receipt of the increased rent, must expire at the time when the tenant originally entered.(y)

When a tenant took possession in the middle of a quarter, paid rent from the time of his coming in up to the next quarter day, (Christmas,) and then paid his rent half yearly at Midsummer and Christmas, it was ruled at *Miri Prius*, that the tenancy commenced from Christmas, and not from the preceding half quarter.(z) But where the tenant entered in the middle of a quarter, upon an agreement "to pay rent quarterly, and for the half quarter," it was left to the jury, whether the party was tenant from the quarter day, prior to the time when he entered, or from the succeeding quarter day; and under the direction of Lord *Ellenborough*, C. J. the jury found that the tenancy commenced with the preceding quarter.(a)

When the demise is by parol, and in general terms to hold from feast to feast, as from Michaelmas to Michaelmas, it will be a holding from such feast according to the \*new style; unless by the [\*136] custom of the country where the lands lie, (which custom may be proved by parol testimony,) such tenancies commence according to the old style.(b) If, however, the demise be by deed to hold from any particular feast, as "*from the feast of St. Michael's, &c.*" the holding must

(c) *Doe, d. Riggs, v. Bell*, 5 T. R. 471.  
*Doe, d. Peacock, v. Raffan*, 6 Esp. 4.

(y) *Doe, d. Bedford, v. Kendrick*, Warwick Sum. Ass. 1810.—MS.

(z) *Doe, d. Holcomb, v. Johnson*, 6 Esp. 10.

(a) *Doe, d. Wadmore v. Schwyn*, H. T. 47 Geo. III.—MS.

(b) *Furley, d. Mayor of Canterbury, v. Wood*, 1 Esp. 198. Run. Eject. 112.

[1] *Vide ANTE, Page 108, n. [1.]*



be taken to be according to the new style, notwithstanding the custom ; and this rule prevails, although the tenancy be created by a holding over after the expiration of the lease, and the original entry was according to the old style.(c)

Upon the same principle, a notice to quit at Michaelmas generally, *prima facie* means new Michaelmas ; but if the tenant entered at old Michaelmas, it will be construed to mean old Michaelmas.(d)

A tenant sometimes enters upon different parts of the land at different periods of the year, although all are contained in one demise ; and the notice to quit must then be given with reference to the substantial time of entry, that is to say, with reference to the time of entry on the substantial part of the premises demised ; no notice being taken of the time of entry on the other parts, which are auxiliaries only ; though the tenant will be obliged to quit them at the respective times of entry thereon.(e)

This substantial time of entry, it has been contended, must be determined by the times when the rent is payable ; but it is holden to [\*137] depend, either upon the general \*custom of the country where the lands lie, or upon the relative value and importance of the different parts of the demised premises ; and of these facts it is the province of the jury to determine.

As few decisions are to be found on these points, it will be useful to give a concise statement of them.

Where the landlord agreed to let the defendant a farm, to hold the arable land from the 13th of February then next, the pasture from the 5th of April, and the meadow from the 12th of May, at a yearly rent payable at old Michaelmas and old Lady-day, the first payment to be made at Michaelmas, then next, it was held to be a tenancy from old Lady-day to old Lady-day ; because the custom of most countries would have required the tenant to have quitted the arable and meadow lands on the 13th of February, and 12th of May, without any special agreement, and a notice to quit at old Lady-day, delivered before old Michaelmas, was held sufficient.(f)

(c) *Doe, d. Spicer, v. Lea*, 11 East, 812.

(d) *Doe, d. Hinde, v. Vince*, 2 Campb. 256.

(e) *Doe, d. Strickland, v. Spence*, 6 East,

(f) *Doe, d. Dagget, v. Snowden*, 2 W.

Blk, 1224.

So, also, upon a demise of the same nature, namely, that the tenant should enter upon the arable land at Candlemas, and the house and other premises at Lady-day, to which was added a proviso, that the tenant should quit the premises "*according to the times of entry as aforesaid*," it was held by the court, that the proviso made no alteration in the tenancy, so as to require a notice six months before Candlemas, because it merely expressed what the law would otherwise have implied; that the substantial time of entry was at Lady-day, with a privilege to the tenant on the one hand to enter on the arable land before that period, \*for the purpose of preparing it, and on the other hand a sti- [\*138] pulation by him, when he quitted the farm, to allow the same privilege to the incoming tenant; and, therefore, that a notice to quit given six month previous to Lady-day, although less than six months before Candlemas was sufficient.(g)

Where the premises contained in the demise consisted of dwelling-houses, and other buildings, used for the purpose of carrying on a manufacture, a few acres of meadow, and pastureland, and bleaching-grounds, together with all water courses, &c. and the tenant held under a written agreement for a lease, to commence as to the meadow ground from the 25th of December then last, as to the pasture from the 25th of March then next, and as to the houses, mills, and all the rest of the premises, from the 1st of May, the rent payable on the day of Pentecost and Martinmas, the Court held, that the substantial time of entry was the 1st of May, inasmuch as the substantial subject of the demise was the house and buildings for the purpose of the manufacture, to which every thing else in the demise was merely auxiliary.(h)

Where a house and thirteen acres of land, were demised for eleven years, to hold the lands from the 2d of February, and the house and other premises from the first of May, at the yearly rent of 24*l.* payable at Michaelmas and Lady-day, the jury found the land to be the principal subject of the demise; and the plaintiff was nonsuited on account of the notice to quit not having been given six months previous to the 2d of February. The Court was afterwards \*mo- [\*139] ved to set aside the nonsuit, on the ground that the house was the principal part of the demise; (being situated near a borough;) or, at all events, that the relative value and importance of the house and lands were

(g) *Doe, d. Strickland, v. Spence*, 6. East, 120.

(h) *Doe, d. Lord Bradford, v. Watkins*, 7 East 551.

so nearly balanced, it was immaterial to which the notice referred : but the Court refused the rule, saying, it was for the jury to decide which was the principal, and which the accessory part of the demise.(i)

Lastly, of the acts by which a regular notice to quit may be waived.

The acceptance of rent, accruing subsequently to the expiration of the notice, is the most usual means by which a waiver of it is produced ; but the acceptance of such rent is not of itself a waiver of the notice, but matter of evidence only to be left to the jury, to determine with what views, and under what circumstances, the rent is paid and received.

If the money be taken *nomine pena*, as a compensation for the trespass, or with an express declaration that the notice is not thereby intended to be waived, or if there be any fraud or contrivance on the part of the tenant in paying it, or if the payment be accompanied by other circumstances which may induce an opinion, that the landlord did not intend to continue the tenancy, no waiver will be produced by the acceptance. The rent must be paid and received *as rent*, that is to say, it must be so paid and received, as to satisfy the jury of an intention to continue the tenancy, or the notice will remain in force. Thus, where the landlord brought an ejectment immediately upon [ \*140 ] the \*expiration of the notice, and after the appearance of the tenant in the action, received from him a quarter's rent, accruing subsequently to the day when the notice expired, but nevertheless continued his action, the Court were of opinion (upon a motion for a new trial, after the verdict for the defendant,) that from the continuance of the suit by the landlord, after the acceptance of the rent, a fair inference might be drawn, that he did not mean to waive his notice ; and as that point had not been left for the consideration of the jury, (who had been directed at the trial to find for the defendant, upon the simple fact of the quarter's rent having been paid and received,) the motion for the new trial was granted.(j) So, also, where the rent was usually paid at a banker's, and the banker, in the common routine of business, received a quarter's rent from the tenant after the expiration of the notice, no waiver of the notice was thereby created.(k) But where the notice expired at Michaelmas, 1792, and the landlord accepted rent due at Lady-

(i) *Doe, d. Heapy, v. Howard*, 11 East, 498.

(j) *Doe, d. Chong, v. Batten*, Cowp. 243.

(k) *Doe, d. Ash, v. Calvert*, 2 Campb. 387.

day, 1793, and did not bring his ejectment until after such acceptance, nor try the cause until 1795, the jury held that the notice was waived.<sup>(l)</sup>

The notice may also be waived by other acts of the landlord ; but they are all open to explanation, and the particular act will, or will not, be a waiver of the notice, according to the circumstances which attend it. Thus, a second notice to quit, given after the expiration of the first notice, but also after the commencement of an ejectment, in which the landlord continued to proceed, notwithstanding his second notice, was holden to be no waiver of the \*notice originally given [ \*141 ] en ; because, it was impossible for the tenant to suppose, that the landlord meant to waive a notice upon the foundation of which he was proceeding to turn him out of his farm.<sup>(m)</sup>[1] Where, also, after the expiration of a regular notice to quit, the landlord gave a second notice in these words :—"I do hereby desire you to quit the premises which you *now* hold of me, within fourteen days from this date, or I shall insist upon double value," it was ruled by Lord *Ellenborough*, C. J. at *Nisi Prius*, that the second notice could not be intended, or understood to be intended, as a waiver of the first, or even as an acknowledgment of a subsisting tenancy *at will* having for its object merely the recovery of double value ; and the lessor of the plaintiff recovered upon a demise anterior to the expiration of the second notice.<sup>(n)</sup> So, also, where a notice was given "to quit the premises *which you hold under me*, your term therein having long since expired," the Court considered the paper as a mere demand of possession, and not as a recognition of a subsisting tenancy.<sup>(o)</sup>

But where the defendant was lessee by assignment of certain tithes, under an agreement, which only operated to create a tenancy from year to year, and the impropiator, in March, 1810, (some days after the assignment,) gave the original lessee a notice to quit at Michaelmas fol-

(l) *Goodright, d. Charter, v. Cordwint*, 6 T. R. 219.

(m) *Doe, d. Williams, v. Humphreys*, 2 East, 236.

(n) *Doe, d. Digby, v. Steel*, MS. and 3 Campb. 115.

(o) *Doe, d. Godsell, v. Englis*, 3 Taunt. 5.

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[1] After verdict against a tenant for not quitting pursuant to notice, a subsequent distress by the landlord, for rent due after the verdict, does not waive the notice to quit ; nor is it any ground for setting aside the verdict, or staying execution. *Doe ex dem Holmes vs. Darby, Clerk*, 3 Taunt. Rep. 538.

owing, and afterwards, in March, 1811, gave the assignee a notice to quit at the then next Michaelmas, the Court were clearly of opinion, that such second notice was a waiver as to the assignee of the former notice given to the original lessee. And, in answer to an argument in [ \*142 ] \*support of the efficacy of the first notice, that the original tenancy having expired at Michaelmas, 1810, could not be set up again by another notice to the defendant in 1811, inasmuch as the giving of a person notice to quit does not operate to create a tenancy in him, the Court observed, "It does not necessarily do so, but it is generally considered as an acknowledgment of a subsisting tenancy; and if the party obeys the notice, how can he be deemed a trespasser on account of a prior notice to another person? Nothing appears to shew, that the defendant had knowledge of any other notice to quit than the one which was served upon him;" and *Bayley, J.* added, "the second notice gives the defendant to understand, that if he quits at Michaelmas, 1811, he will not be deemed a trespasser." (p)

It may be collected from this case, that if a tenant, having underlet the premises, receive from his landlord a notice to quit, and the landlord afterwards give to the under-tenant a notice to quit, expiring at a subsequent period, (q) he is precluded from recovering in an ejectment against such under-tenant, upon a demise anterior to the time of the expiration of the notice so given by him to the under-tenant. [1] And if, after the expiration of a regular notice, the landlord should give to the same tenant a second regular notice, in the usual form, to quit at the termination of the next, or any subsequent year of the tenancy, without referring therein to any claim for double value, and without having taken any steps, in the intermediate time, to enforce the first notice, it may be doubted, whether such second notice will not also amount to a waiver of the first.

[ \*143 ] \*In a case where a landlord, after the delivery of a notice to quit, promised the tenant that he should not be turned out until

(p) *Doe, d. Brierly, v. Palmer*, 16 East, 58.

(q) *Ante*, 123, 128.

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[1] In an action of Ejectment, the plaintiff must be nonsuited, if it be proved that a notice to quit at the end of six months was given by the lessor of the plaintiff to the occupier of the premises a short time before the bringing of the action. *Doe ex dem. Scott vs. Miller*, 2 Carr. & P. Rep. 348.

the place was sold, and after the sale of the premises, brought an ejectment upon a demise anterior to the time of the sale; it was contended that the permission to occupy was a waiver of the antecedent notice, so far as to prevent the tenant from being considered as a trespasser by relation back to the time when the notice expired, and that the demise ought to have been laid posterior to the day when the contract for the sale was made. But the Court held, that the permission amounted only to a declaration on the part of the landlord, that until the sale of the place, he would suspend the exercise of his right under the notice, and indulge the tenant by permitting him to remain on the premises; and that it was not intended to vacate the notice, or be destructive of any of the rights which the landlord had acquired under it.(r)

The acceptance by the landlord of the double value of the premises, given by the stat. 4 Geo. II. c. 28. when the tenant wilfully holds over after the expiration of a written notice to quit, or the bringing of an action of debt for the same, will not be a waiver of the notice; for the double value is given as a penalty for the trespass, and not as a payment between landlord and tenant. But if, after the expiration of a notice to quit by the tenant, the landlord accept the double rent to which he is entitled by the stat. 11 Geo. II. c. 19., it seems that he cannot afterwards \*proceed upon the notice to quit; for this latter statute recognizes the party by the name of tenant, which the first statute does not, and gives a right of distress for the double rent, which is a remedy applicable only to the relation of landlord and tenant.(s)

In cases where the act of the landlord cannot be qualified, but must of necessity be taken as a confirmation of the tenancy, as if he distrain for rent accruing after the expiration of the notice, or recover it in an action for use and occupation, the notice will of course, be waived :(t) but it seems that a pending action for such use and occupation will not be sufficient to invalidate the notice; for the landlord may only recover to the time of the expiration of the notice, although he claim rent to a latter period.(u)

(r) *Whitaker, d. Boul, v. Symonds*, 10 East, 13.

(s) *Doe, d. Cheney, v. Batten*, Cowp 245. *Timmins v. Rowlinson*, Barr. 1608. *Souleby v. Neving*, 9 East, 210. *Ryal v. Rich*, 10 East, 48.

(t) *Zouch, d. Ward, v. Willingale*, 1 H. Blk. 311.

(u) *Per Buller, J., Birch v. Wright*, 1 T. R. 578. *et vide Roe, d. Crompton, v. Minshall*, 8 N. P. 650.

By the common law, if a landlord distrained after the expiration of a term, though for rent accruing during its continuance, he was held to have acknowledged a subsequent tenancy; because, by the common law, no distress could be made after the determination of a demise;(v) but since the statute 8 Ann. c. 14. s. 6. & 7. by which a landlord is allowed to distrain within six calendar months after the determination of a lease for life, for years, or at will, provided his own title, or interest, and the possession of the tenant, from whom such rent became due, be continuing, a distress for rent accruing at the time of the ex-  
[ \*145 ] piration of \*the notice to quit, if made within the six months, will be no waiver thereof.

Next, of the termination of a tenancy by the act of the tenant, which may happen in two several ways; first, by a notice to his landlord that he intends to quit the possession;(w)[1] secondly, by the non-payment of rent, or non-performance of a covenant.(x)

As the relation of landlord and tenant is mutual, the principles which govern the first of these modes have been discussed, when treating of the notice to quit as given by the landlord; and it, therefore, now only remains to inquire into the regulations adopted by the courts in the two latter instances.

The right to give a notice to quit is given by the common law, and is necessarily incidental to a tenancy from year to year: [2] the determina-

(v) *Pennant's case*, 3 Co. 64.

(w) Appendix, No. 4.

(x) As the non-payment of rent is, in fact, the non-performance of a covenant, this particular enumeration may perhaps be logically

incorrect; but as the proceedings differ so materially in cases of non-payment of rent, and of non-performance of other covenants, it was thought most conducive to perspicuity, to name them separately.

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[1] The "*Revised Statutes*," Part 2, Chap. 1. Tit. 4, § 10, (*Vol. 1, p. 745*.) contain the following provision as to notice to quit, given by the Tenant.

"§ 10. If any tenant shall give notice of his intention to quit the premises by him holden, and shall not accordingly deliver up the possession thereof, at the time in such notice specified, such tenant, his executors or administrators, shall, from thenceforward, pay to the landlord, his heirs or assigns, double the rent which he should otherwise have paid, to be levied, sued for and recovered, at the same time and in the same manner, as the single rent; and such double rent shall be continued to be paid during all the time such tenant shall continue in possession as aforesaid."

[2] In the case of *Jackson ex dem. Wood vs. Salmon*, (4 *Wend. Rep.* 327.) it was shewn on the trial that one *Wells* entered into possession of

tion of a tenancy by the non-payment of rent, or the non-performance of a covenant, can only arise under an express agreement between the parties, and seldom occurs but where the tenant has a written lease for a determinate period.

It has already been observed,(y) that an actual entry upon the lands was formerly necessary before an ejectment could be maintained, and that the claimant's title must be of such a nature as to render his entry legal. Where, therefore, a lease for years was granted to the tenant, and the right of possession thereby transferred to him, the landlord could not legally enter upon the land during the continuance of the term; and was, consequently, without remedy to recover back his possession whilst the term lasted, although the tenant should neglect to render his rent, or otherwise disregarded the conditions of his grant.[1] When terms for years increased in length and

(y) *Ante*, 10.

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the premises in question, in *March*, 1824, as a Tenant of the Lessor of the Plaintiff for *One Year*, to work the same on shares. He held over. In *May*, 1825, the Defendant entered under *Wells*, (*Wells* remaining in possession,) to work the land on shares, and on the fourteenth of the same month an ejectment was commenced against him. The plaintiff was nonsuited for the reason that the defendant was a mere cropper; that *Wells* was the real tenant, and, remaining in possession, the action should have been brought against him. A motion was made to set aside the nonsuit.

*By the Court*, SAVAGE, Ch. J. "The only question in the case is, whether the defendant was entitled to notice to quit. *Wells* entered into possession lawfully; he hired the premises for one year, and continued in possession after that period; he was tenant from year to year, and was entitled to notice before an ejectment could be brought against him. The defendant coming in under *Wells*, stands in the same relation to the lessor. A tenant for a year, holding over, is tenant from year to year, and not at will; but if at will, he was entitled to notice. (4 *Cowen*, 349.) We therefore refuse to set aside the nonsuit."

[1] After articles for the sale of land, on which the vendor receives part of the purchase money in hand, and the residue to be paid in several instalments, if the times of payment have long expired, without payment by the vendee before or after the suit brought, the vendor may recover in Ejectment. *Martin vs. Willink & AL*, 7 *Serg. & R. Rep.* 297.

If *A.* purchase the right of *B.* to land under an application and survey, he is answerable to the Commonwealth for the purchase money, and is not bound to pay till called upon; and if the representatives of *B.* obtain a patent, not at the request of *A.* nor for his benefit, but for the purpose of vesting the title in themselves, *A.* may recover in Ejectment against them,



value, this became a serious evil to landlords. The tenant might be so indigent as to render an action of covenant upon the original lease altogether useless, and the premises might be left without a sufficient distress to countervail an arrear of rent. As a means of obviating these difficulties, it became the practice for landlords to insert in their leases certain provisoes and conditions declaring the lease forfeited, if the rent remained unpaid for a certain time after it became due, or if any other particular covenant of the lease were broken by the lessee, and empowering the landlord in such cases to re-enter upon, and re-occupy his lands.[2]

When the provisoes of this nature were first introduced, the ancient practice prevailed, and of course actual entries were then made in these as in all other cases; and it seems also to have been necessary, for some years after the modern practice was invented, and the sealing of leases dispensed with, for landlords to make actual entries upon the lands, before they could take advantage by ejectment of the forfeiture of a lease. This useless form is now, indeed, abolished; but as the right to make the entry is still necessary, the provisoes are continued to the present day in their ancient terms.(z)

[ \*147 ] \*Having thus briefly shown the principles upon which these provisoes are founded, we shall now inquire, first as to the cov-

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(z) *Little v. Heaton*, Salk. 258. S. C. Ld. Doug. 477. *Anony.* 1 Vent. 245. *Wither v. Raym.* 750. *Goodright, d. Hare, v. Cutler* Gibson, 3 Keb. 218.

or those claiming under them, without previously tendering the money expended in procuring the patent. *Vincent vs. The Lessee of Huff*, 8 Serg. & R. Rep. 381.

[2] The grantee of a right of working certain Mines, commenced working them, but after some time discontinued, not being prevented by the want of water, or any other inevitable accident. The grantor, after some lapse of time, verbally authorized other persons to dig for ore throughout part of the land described in the deed, and met those persons on part of the land and pointed out the boundaries within which they were to exercise the liberty; and himself subsequently entered into a mining adventure with other persons, which was carried on within the limits described in the indenture; and afterwards in consideration of the surrender of the first grant, and of certain payments, demised the premises to a lessee for twenty-one years; and upon the execution of this lease, the original deed was delivered up, but there was no surrender in writing: *Held*, that these acts amounted to a re-entry by the grantor, inasmuch, as unless referred to the exercise of that right, they would be acts of trespass by him. *Doe ex dem. Hanley vs. Wood*, 2 Barnew. & Ald. Rep. 724.

enants deemed by our law to be valid ; secondly, as to what will amount to the breach of any particular covenant, and herein of the proceedings at common law, and under the statute 4 Geo. II. c. 28. on a clause of re-entry for non-payment for rent ; and, thirdly, as to the modes by which conditions may be dispensed with, or forfeitures waived.

The landlord, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be neither contrary to the laws of the kingdom, nor to the principles of reason, or public policy ;[1] and it is by these general maxims we must be guided, when called upon to consider the validity of any particular covenant in a lease ; for only one decided case upon the subject is to be found in our legal authorities.

The lease in that case was for twenty-one years, and the proviso, that the landlord should have the power to re-enter, if the tenant committed any act of bankruptcy whereon a commission should issue. This proviso was holden valid, upon the principle, that as it is reasonable for a landlord to restrain his tenant from assigning, so it is equally reasonable for him to guard against such an event as bankruptcy, for the consequences of bankruptcy would be an assignment ; and that such a proviso is not contrary to any express law, nor against reason or public policy, for it is a proviso which cannot injure the creditors, who would not rely on the possession of the land by the occupier without a knowledge also of the interest he had therein ; and to discover this they must look into the lease itself, where they would find the proviso, that the tenant's interest would be forfeited in \*case of bankruptcy. *Buller*, [ \*148 ] J. in his judgment on the case, made a distinction between leases for short terms, and very long leases, with respect to provisos of this nature ; because, if they were to be inserted in very long leases, it would be tying up property for a considerable length of time, and be open to the objections of creating a perpetuity ; but he afterwards adds, that the principal ground of his decision was, because it was a stipulation not against law, nor repugnant to any thing stated in the former

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[1] A ferry is of that description of property, which, in technical language, is denominated incorporeal, and which in legal consideration is not tangible. Like a right of way or of common, or other incorporeal right, no entry in point of fact can in strict propriety be said to be made upon it ; nor could the sheriff, in case of a judgment of restitution, deliver possession ; in such a case an Ejectment would not lie. *Rees vs. Lawless*, *Litt. Select. Cas.* 184.

part of the lease, but merely a stipulation against the act of the lessee himself, which it was competent for the lessor to make.(a)

Secondly, of what will amount to the breach of any particular covenant,[1] and herein of the proceedings at common law, and under the statute 4 Geo. II. c. 28. on a clause of re-entry for non-payment of rent.

The power generally reserved in leases to landlords to re-enter upon the premises, in case the rent shall remain in arrear for a certain time after it is due, is the most common proviso upon which ejectments for forfeitures for breach of covenant are founded, and as several provisions are made, both by the common and statute law, for regulating ejectments brought upon such provisos, a separate consideration of the mode of proceeding upon a clause of re-entry for rent in arrear, seems the most perspicuous method of treating the subject.

At the time when provisos for re-entry were first introduced, it was unfortunately the practice to disfigure the principles of law by [\*149] endless subtleties and distinctions; \*and the preliminaries required by the common law, before a landlord can bring an ejectment upon a clause of re-entry for non-payment of rent, are so numerous, as to render it next to impossible for any, unversed in the practice of the courts, to take advantage of a proviso of this nature. First, a demand of the rent must be made, either in person, or by an agent properly authorised.(b) Secondly, the demand must be of the precise rent due; for if he demand a penny more, or less, it will be ill. Thirdly, it must be made *precisely upon the day* when the rent is due, and payable, by the lease, to save the forfeiture: as, where the proviso is, "that if the rent shall be behind and unpaid, by the space of thirty, or any other number of days after the day of payment, it shall be lawful for the lessor to re-enter," a demand must be made on the thirtieth, or other *last*

(a) *Roe, d. Hunter, v. Galliers*, 2 T. R. 133.

(b) *Roe, d. West v. Davis*, 7 East, 363.

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[1] Where a lease contains a covenant against waste, and also a clause of re-entry for a breach of covenants, if the lessee or his assigns, commit waste, the lessor may bring Ejectment. *Jackson ex dem. Church & Al. vs. Brownson*, 7 Johns. Rep. 227.

day. Fourthly, it must be made a convenient time before sun-set. Fifthly, it must be made upon the land, and at the most notorious place of it. Therefore, if there be a dwelling-house upon the land, the demand must be at the front or fore door, though it is not necessary to enter the house, notwithstanding the door be open; but if the tenant meet the lessor either *on* or *off* the land, *at any time* of the last day of payment, and tender the rent, it is sufficient to save a forfeiture, for the law leans against forfeitures. Sixthly, unless a place is appointed where the rent is payable, in which case the demand must be made at such place. Seventhly, a demand of the rent must be made *in fact*, although there should be no person on the land ready to pay it.(c)

Nor are these the only vexatious difficulties to which a \*land- [\*150] lord, by the common law, was subject. The courts, notwithstanding his compliance with all the required formalities, would set aside the forfeiture, upon the payment of the debt and costs, at any time before execution executed ;(d) and the tenant might at any time apply to a court of equity for relief.

Where the ejectment is brought upon a clause of re-entry, and *less than six months rent is due*, all these evils still exist; although by the wise provisions of the legislature, the landlord is now relieved from the two latter inconveniences, in all cases where six months rent is in arrear; and is also exempted from an observance of the forms and niceties of the common law, if there be likewise no sufficient distress upon the premises.

By the 4th Geo. II. c. 28. s. 2.[1] it is enacted, that, "in all cases

(c) 1 Saund. 287. (n. 16.)

(d) *Roe, d. West, v. Davis*, 7 East, 363, and the cases there cited.

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[1] By 4 G. 2. c. 28. s. 2. it is enacted, "that in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in Ejectment for the demised premises, which service shall stand in the place and stead of a demand and re-entry;" *Held*, that by this statute the service of the declaration in Ejectment is substituted for the demand of rent, which, at common law must have been made upon the day when the forfeiture accrued in case of non-payment, and, therefore, that it was no ground of nonsuit in Ejectment that the declaration was served on a day subsequent to the day on which the demise was laid, that being after the

"between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the

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rent became due ; because the title of the lessor must be taken to have accrued on the day when the forfeiture would have accrued at common law by non-payment of rent. *Doe ex dem. Lawrence & Al. vs. Showcross*, 3 Barnew. & Cress. Rep. 752.

The "*Revised Statutes*" of New-York, Part 3, Chap. 8, Tit. 9, Art. 2. (Vol. 2, pp. 505, 506 & 507,) contain the following Enactments.

"§ 30. Whenever any half year's rent, or more, shall be in arrear from any tenant to his landlord, and no sufficient distress can be found on the premises, to satisfy the rent due, if the landlord has a subsisting right by law to re-enter for the non-payment of such rent, he may bring an action of ejectment for the recovery of the possession of the demised premises ; and the service of the declaration therein, shall be deemed, and stand instead of, a demand of the rent in arrear, and of a re-entry on the demised premises.

"§ 31. If upon the trial of the cause, it shall be proved, or upon judgment by default, against the defendant, it shall appear to the court by affidavit, that the landlord had a right to commence such action, according to the provisions of the preceding section, the plaintiff in such ejectment shall have judgment to recover the possession of the demised premises and his costs, and the court shall award execution therefor.

"§ 32. At any time before judgment in such cause, the defendant may either tender to the landlord, or bring into the court where the suit shall be pending, all the rent in arrear at the time of such payment, and all costs and charges incurred by the lessor ; and in such case, all further proceedings in the said cause shall cease.

"§ 33. At any time within six months after possession of the demised premises shall have been taken by the landlord, under any execution issued upon a judgment obtained by him, in any such action of ejectment, the lessee of such demised premises, his assigns or personal representatives, may pay or tender to the lessor, his personal representatives or attorney, or into the court where the suit shall be pending, all the rent in arrear at the time of such payment, and all costs and charges incurred by the lessor ; and in such case, all further proceedings in the said cause shall cease, and such premises shall be restored to the lessee, who shall hold and enjoy the demised premises, without any new lease thereof, according to the terms of the original demise.

"§ 34. In case the said rent and arrears, and full costs, shall remain unpaid for six months after the execution issued upon any judgment in ejectment shall have been executed, the lessee and his assigns, and all other persons deriving title under the said lease, from such lessee, shall be barred and foreclosed from all relief or remedy in law or equity, (except for any error in the record or proceedings,) and the said lessor or landlord, shall from thenceforth hold the said demised premises free and discharged from such lease or demise.

"§ 35. A mortgagee of such lease, or of any part thereof, who shall not be in possession of such demised premises, and who shall, within six months after such judgment obtained and execution thereon executed, pay all rent in arrear, and all costs and charges as aforesaid, and perform all the agreements which ought to be performed by the first lessee, shall not be affected by such recovery in ejectment.

"same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession of the premises, may then affix the same upon the door of any of the demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments, comprised in such declaration in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such declaration in ejectment, shall stand in the [\*151] place and stead of a demand and re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made to appear to the court where the said suit is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the said declaration was served; and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter; that then, and in every such case, the lessor or lessors in ejectment shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the

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"§ 36. The lessee, or any person claiming any interest in such lease, may within six months after execution executed on such judgment in ejectment, file his bill for relief in a court of equity, but not after that time; and if relieved in such court, he shall hold and enjoy the demised premises, without any new lease thereof, according to the terms of the original demise.

"§ 37. In case of such bill being filed within the time aforesaid, the complainant shall not have or continue any injunction against the proceedings at law on such ejectment, unless he shall, at such time as the chancellor shall direct, bring into court such sum of money as the lessor shall in his answer have sworn to be due and in arrear, over and above all just allowances, and also all the costs taxed in the said suit, there to remain until the hearing of the cause, or to be paid to the lessor on good security, as the court may direct.

"§ 38. If the lessor shall have entered into the actual possession of the demised premises, the court may direct that so much, and no more, as he shall really have made of the said premises, during his possession thereof, or as he might, without wilful neglect, have made of the said premises, be deducted from the amount of the rent in arrear to such lessor and the costs of such ejectment; and the complainant shall be required to pay the balance, before he shall be restored to the possession of the said premises."

“ lessee or lessees, his, her, or their assignee or assignees, or other per-  
 “ son or persons claiming or deriving under the said leases, shall permit  
 “ and suffer judgment to be had and recovered on such ejectment, and  
 “ execution to be executed thereon, without paying the rent and arrears,  
 “ together with full costs, and without filing any bill or bills for relief in  
 “ equity, within six calendar months after such execution executed;  
 “ then such lessee, &c. and all other persons claiming and deriving un-  
 “ der the said lease, shall be barred and foreclosed from all relief or  
 “ remedy in law or equity, other than by writ of error, for reversal of  
 “ such judgment, in case the same shall be erroneous, and the said land-  
 “ lord or lessor shall from thenceforth hold the said demised premises  
 “ discharged from such lease; and if on such ejectment, a verdict shall  
 “ pass for the defendant, or the plaintiff shall be nonsuited therein, ex-  
 “ cept for the defendant's not confessing, &c. then such defendant shall  
 “ have and recover, his, her, or their full costs: provided always, that  
 “ nothing herein contained shall extend to bar the right of any  
 [ \*152 ] “ mortgagee or mort-<sup>g</sup>agees of such lease, or any part there-  
 “ of, who shall not be in possession, so as such mortgagee or  
 “ mortgagees shall, within six calendar months after such judgment ob-  
 “ tained, and execution executed, pay all rent in arrear, and all costs  
 “ and damages sustained by such lessor, or persons entitled to the re-  
 “ mainder or reversion as aforesaid, and perform all the covenants and  
 “ agreements, which on the part and behalf of the first lessee or lessees  
 “ ought to be performed.”

By section 3, “ in case the said lessee or lessees, his, her, or their as-  
 “ signee or assignees, or other person claiming any right, title, or inter-  
 “ est, in law or equity, of, in, or to the said lease, shall, within the time  
 “ aforesaid, file one or more bill or bills, for relief in any court of equity,  
 “ such person or persons shall not have or continue any injunction,  
 “ against the proceedings at law on such ejectment, unless he, she, or  
 “ they shall, within forty days next after a full and perfect answer shall  
 “ be filed by the lessor or lessors of the plaintiff in such ejectment, bring  
 “ into Court, and lodge with the proper officer, such sum of money, as  
 “ the lessor or lessors of the plaintiff in the said ejectment shall, in their  
 “ answers, swear to be due and in arrear, over and above all just allow-  
 “ ances, and also the costs taxed in the said suit, there to remain till the  
 “ hearing of the cause, or to be paid out to the lessor or landlord on  
 “ good security, subject to the decree of the Court; and in case such  
 “ bill or bills shall be filed within the time aforesaid, and after execution

“ is executed, the lessor or lessors of the plaintiff shall be accountable  
 “ only for so much, and no more, as he, she, or they shall really and *bona*  
 “ *fide*, without fraud, deceit, or wilful neglect, make of the demised pre-  
 “ mises from the time of their entering into the actual posses-  
 “ sion thereof; and if what \*shall be so made by the lessor [\*153]  
 “ or lessors of the plaintiff, happen to be less than the rent  
 “ reserved on the said lease, then the said lessee or lessees, his, her, or their  
 “ assignee or assignees, before he, she, or they shall be restored to his, her,  
 “ or their possession or possessions, shall pay such lessor or lessors, or  
 “ landlord or landlords, what the money so by them made, fell short of  
 “ the reserved rent, for the time such lessor or lessors of the plaintiff,  
 “ landlord or landlords, held the said lands.”

Section 4. “ Provided, that if the tenant or tenants, his, her, or their  
 “ assignee or assignees, shall at any time before the trial in such eject-  
 “ ment, pay or tender to the lessor or landlord, his executors or adminis-  
 “ trators, or his, her, or their attorney in that cause, or pay into the court  
 “ where the same cause is depending, all the rent and arrears, together  
 “ with the costs, then all further proceedings on the said ejectment shall  
 “ cease and be discontinued; and if such lessee, &c. or their executors,  
 “ administrators, or assigns, shall, upon such bill filed as aforesaid, be  
 “ relieved in equity, he, she, and they, shall have, hold, and enjoy, the  
 “ demised lands, according to the lease thereof made, without any new  
 “ lease to be thereof made to him, her, or them.”

\*Some little perplexity attends the wording of these sec. [\*154]  
 tions, which seem, upon the first reading, to extend only to  
 cases of ejectment brought after half a year's rent due, where the land-  
 lord has a right to re-enter, and where no sufficient distress is to be  
 found upon the premises; but the statute has been held to be more gen-  
 eral in its operation, and its provisions (with the exception of the one,  
 which dispenses with the formalities required by the common law upon  
 a clause of re-entry for non-payment of rent,) extend to all cases where  
 there is six months' rent in arrear, and a right of re-entry in the land-  
 lord.(e)[1]

(e) *Ree, d. West, v. Davis*, 7 East, 368.

[1] In Ejectment to recover demised premises for the non-payment of  
 rent, under the usual proviso for re-entry on non-payment for twenty-one  
 days, it appeared that the rent was payable quarterly, and that a demand  
 of more than one quarter's rent was made on the 21st day at 1 o'clock :  
*Held*, that only one quarter's rent should have been demanded, and that  
 at sun set. *Doe ex dem. Wheeldon vs. Paul*, 3 Carr. & P. Rep. 613.



The legislature appear to have four different objects in view, in the enactments of this statute. First, to abolish the idle form of a demand of rent, where no sufficient distress can be found upon the premises to answer that demand; secondly, in cases of beneficial leases which may have been mortgaged, to protect the mortgagees against the fraud or negligence of their mortgagors. Thirdly, to render the possession of the landlord secure, after he has recovered the lands; and fourthly, to take from the Court the discretionary power they formerly exercised, of staying the proceedings, at any stage of them, upon payment of the rent in arrear, and costs. The first of these objects is effected by permitting the landlord to bring his ejectment without previously demanding the rent: the second, by permitting a mortgagee not in possession to recover back the premises at any time within six months after execution executed, by paying all the rent in arrear, damages and costs of the lessor, and performing all the covenants of the lease: (f) the third, [ \*155 ] by limiting the time for the lessee \*or his assigns, to make an application to a court of equity for relief, to six calendar months after execution executed: and the fourth, by limiting the application of the lessee to stay proceedings, upon payment of the rent in arrear and costs, to the time anterior to the trial, and making it compulsory upon the Court to grant the application when properly made. (g)

As this statute dispenses with a demand for rent in those cases only where there is no sufficient distress upon the premises, as well as six months rent in arrear, it is still necessary for the lessor to comply with all the formalities of the common law, before he can proceed upon a clause of re-entry for non-payment of rent, if a sufficient distress can be found. (h) [1] But an insertion in the proviso of the lease that the

(f) It is difficult to discover from the report of the case of *Doe, d. Whitfield, v. Roe*, 3 Taunt. 402, what was the true point submitted to the judgment of the court. It is quite clear it is not the one stated in the margin, viz. "that the mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, and upon the same terms, as the lessee against whom the recovery is had," because by the provisions of this statute, a lessee can only have relief against

an ejectment for a forfeiture, upon paying the arrears of rent and costs of suit into court before trial, whereas a mortgagee may obtain relief upon paying the arrears, costs, and damages, at any time within six months after execution executed.

(g) *Roe, d. West, v. Davis*, 7 East, 363.

(h) *Doe, d. Forster, v. Wandlass*, 7 T. R. 117. Vide *Smith v. Spooner*, 3 Taunt. 246—252.

[1] Where a lease contained a proviso that, if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no legal or formal demand should be made:" *Held*, that the rent having been in arrear for

right of re-entry shall accrue *upon the rent being lawfully demanded*, will not render a demand necessary if there be no sufficient distress, for it is only stating in express words, that which is in substance contained from the principles of the common law in every proviso of this nature.(i)

\*It has been observed, that the provisions of this statute [\*156] (with the exception of the one relating to the demand of rent, extend to all cases where there is six months' rent unpaid, and the landlord has a right to re-enter. This point has only been decided upon that part of the fourth section which directs all proceedings to be staid upon payment of the rent in arrear and costs before trial; [1] but the principle of the decision seems to apply to all the other provisions of the statute as well as to the one then immediately before the Court.—It was objected in that case that the *statute* only applied to cases of ejectment brought after half a year's rent due, where no sufficient distress was to be found upon the premises; but Lord *Ellenborough*, C. J., says, "*the statute is more general in its operation: for though the fourth clause has the word such, (such ejectment,) yet the second clause, to which it refers, is in the disjunctive; stating first, that in all cases between landlord and tenant, when half a year's rent shall be in arrear, and the landlord has a right of re-entry for non-payment thereof, he may bring ejectment &c., or in case the same cannot be legally served, &c., or in case such ejectment shall not be for the recovery of any messuage, &c. and in case of judgment against the casual ejector, or nonsuit, for not confessing lease, entry, and ouster, it shall appear by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the declaration served, and that no sufficient distress was to be found on the premises, and that the lessor had power to re-enter; then,*

(i) *Doe, d. Schofield, v. Alexander*, 2 M. & S. 525. Lord *Ellenborough*, C. J. differed from the other judges in this case, he being of opinion, that when the words "*being lawfully demanded*" were inserted in a proviso for

re-entry, they were to be considered as a stipulation between the parties that the rent should be, in fact, demanded. (though not with the strictness of the common law) before ejectment brought.

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the time specified, an Ejectment might be maintained without actual re-entry, and without any demand of the rent. *Doe dem. Harris vs. Masters*, 2 *Barnew. & Cress. Rep.* 490.

[1] After trial the Court will not relieve the Tenant by staying proceedings in the Ejectment, upon the payment of the arrears of rent and costs. *Doe ex dem. Harris vs. Masters*, 2 *Barnew. & Cress. Rep.* 490.

and every such case, the lessor in ejectment shall recover judgment and execution.”(k)

[ \*157 ] By the words of the fourth section the lessee is to pay the \*ar-rears of rent, &c. into court *before the trial*; and no provision is expressly made for his relief in case he should suffer judgment to go by default against the casual ejector. If, however, the point should arise, it is probable that the Court would not consider a judgment so obtained an equivalent to a trial, but would grant relief to the lessee at any time before the execution executed. In the case of *Goodtitle v. Holdfast*,(l) which was decided about the time when the statute was enacted, relief was given under such circumstances; but as there is no allusion to the statute in the report of the case, it is probable that the decision took place before it passed into a law.

The provision of this fourth section seems also to extend only to cases where the rent and costs are tendered to the lessor, or paid into court, after action brought; yet where the tenant tendered the rent in arrear after the lessor had given instructions to his attorney to commence an action, but before the declaration had been delivered, the court set aside the proceedings with costs, although it was urged by the lessor that such tender was merely matter of defence at the trial.(m)

Where the ejectment was brought on a clause of re-entry in the lease for not repairing, as well as for rent in arrear under the statute, it was argued, on a motion to stay proceedings upon payment of the rent, that the case was not within the act, because it was not an ejectment founded singly on the non-payment of rent; but the Court, notwithstanding, made the rule absolute, with liberty for the lessor to proceed on [ \*158 ] any other title.(n) But where the lessor has \*recovered possession of the premises, a court of equity will not grant relief under the second section, if such recovery was by reason of the breach of other covenants or conditions, as well as by the non-payment of rent. And where the tenant applied to the Court of Chancery to relieve against a recovery upon judgment by default against the casual ejector, alleging that the ejectment was brought for a forfeiture incurred by non-payment of rent, which allegation was contradicted by the landlord, who

(k) *Roe, d. West, v. Davis*, 7 East, 363.

(n) *Pure, d. Withers, v. Sturdy*, B. N. P.

(l) *Easter Term*, 4 Geo. II. Stran. 900.

97.

(m) *Goodright, d. Stevenson v. Norright*,  
W. Black. 746.

stated in his answer, that the tenant had also broken many of the covenants of the lease, for which the landlord had a right to re-enter; [1] the

[1] Where at the bottom of a lease containing a clause of re-entry for non-performance of covenants, conditions, &c.; the lessee agreed not to make any alterations in the buildings without the consent of the lessor: *Held*, that this rested merely in covenant, and was not a condition for the breach of which the lease was to be forfeited. *Jackson ex dem. Welden vs. Harrison*, 17 Johns. Rep. 66.

A covenant or condition in a lease to a person, his heirs and assigns, forever, *yielding* and paying a certain yearly rent, &c. that in case the lessee or his heirs, &c. should be minded to dispose of the premises, or any part thereof, he should give to the lessor, or his heirs, &c., the right of pre-emption or refusal of buying, and would not sell, without his leave, under his hand and seal first obtained; and that on every such sale, with such license, he should pay to the lessor, *one tenth* of the purchase money for which the premises were sold, with a clause that in case of non-performance, &c.; the estate demised should cease, &c. and a clause of re-entry for a breach of the covenants, &c. *Held*, that the lessor might bring Ejectment to recover the possession of the premises on the forfeiture. *Jackson ex dem. Lewis & Uz. vs. Schutz*, 18 Johns. Rep. 174. & *Vide Jackson ex dem. Livingston vs. Groat*, 7 Cowen's Rep. 285, 287.

The estate of the lessee under such a lease, is a fee simple conditional at common law, or a fee simple subject to be defeated upon a condition subsequent. *Ibid.* Per PLATT, J.

And if the condition had been *absolute* not to aliene, it would have been repugnant to the grant, and, therefore, void. *Ibid.*

A covenant by a Lessor, that if the Lessee or his assigns shall be minded to sell or dispose of their Interest, they may do so, first giving the pre-emption to the Lessor, and paying one tenth of the purchase money to him; *Provided*, that if these be not done, the lease shall be forfeited; is valid; and extends not only to an immediate assignment by the lessee, but to his assignee either by operation of Law or voluntary sale. And if the latter assign without offering the pre-emption, and paying the tenth of the money, the lease is forfeited. *Ibid.* (See *Vide Jackson ex dem. Livingston, vs. Kip*, 3 Wend. Rep. 230, 232. *Opinion of the Court, Per SAVAGE, CH. J. limiting this Decision; cited post Page 160, n. [1]*)

If a tenant do an act proper in itself, he cannot be made a wrong doer, by a consequence which he could not anticipate: as if by turning the water of a creek, being an act of good husbandry, by causing the water to flow into a swamp, the timber growing there is killed, it is not to be deemed waste, so as to produce a forfeiture of the lease; especially, where the landlord has lain by for twenty years, during which time new trees had grown up, of more value than the old, and, therefore, no permanent injury had been done to the inheritance. *Jackson ex dem. Van Rensselaer vs. Andrew*, 18 Johns. Rep. 431.

Where a plaintiff in replevin denies in his plea, that the place in which the distress was taken was within the demised premises, such denial does not amount to a general disclaimer of all holding under the lessor, so as to work a forfeiture of the lease. *Jackson ex dem. Deridder vs. Rogers*, 11 Johns. Rep. 33.

court directed an issue to try, whether the landlord knew of any of the breaches of covenant, at the time of bringing the ejectment.(o)

Where the lessors of the plaintiff were both devisees and executors, and in each capacity rent was due to them, the defendant moved to stay proceedings on payment of the rent due to the lessors or the plaintiff as devisees, they not being entitled to bring ejectment as executors; there appeared to be a mutual debt to the defendant by simple contract, and the defendant offered to go into the whole account, taking in both demands, as devisees and executors, having just allowances, which the lessors of the plaintiff refused: the rule was made absolute to stay proceedings on payment of the rent due to the lessors as devisees, and costs.(p)

The proceedings may be staid, either by moving the court, or in vacation time by summons.(q)

[ \*159 ] \*In moving for judgment against the casual ejector, in an ejectment brought under the provisions of this statute, the Court will not grant a rule for judgment without an affidavit,(r)[1] pursuant

(o) *Wadman v. Calcraft*, 10 Vez. 67.

(p) *Duckworth, d. Tubley, v. Tunstall*, Barn. 184.

(q) 2 Sell. Prac. 127.

(r) In the case of *Doe d. Hitchings, v. Leach*, (Burr. 614.) it appeared that the lessor of the plaintiff had once been tenant to the defendant, under a lease for a term of

And in an action of Ejectment by the landlord to recover the premises, on the ground of their being forfeited by such disclaimer, the tenant may give in evidence, that the disclaimer was intended only as to the place in which the distress was taken, and also, that such place was not covered by the lease. *Ibid.*

Whether the doctrine of forfeiture applies at all to a disclaimer by a tenant for life? *Quere. Ibid.*

The words "and these presents, are upon this condition," (viz.) *that the Lessee shall suffer the Lessor to enjoy a way reserved, through the demised premises, without obstruction*, are sufficient in a durable lease to make the estate a conditional one, without an express clause of re-entry; and if the way be obstructed, Ejectment lies. *Jackson ex dem. Blanchard, vs. Allen*, 3 Cowen's Rep. 220.

[1] Where the landlord, on a clause of re-entry for non-payment of rent, obtained judgment by default, against the casual ejector, the record of the judgment, without the previous affidavit required by statute being produced, is a sufficient defence to an Ejectment, brought by the former tenant for the premises. *Jackson ex dem. Smith & Al. vs. Wilson*, 3 Johns. Cas. 286.

to the statute, that half a year's rent was in arrear before declaration

years, of which some are yet to come; and had been ejected by him nearly twenty years before, by a judgment in ejectment against the casual ejector, pursuant to the statute of 4 Geo. II. c. 28. for non-payment of rent. The title set up by the lessor in this last action was the irregularity of the proceedings in the first ejectment, from the want of a proper affidavit whereon to ground the judgment; and the question for the Court to decide was, whether it was necessary for the defendant (the original landlord) to give evi-

dence of this affidavit. The court were unanimously of opinion, that from the lapse of years no such evidence was necessary; [2] but it seems to have been Lord *Mansfield's* opinion, that if the lessor of the plaintiff in the second action had proved, that in point of fact no affidavit had been made, he would have been entitled to recover. But *quære*, if the proper method in such case, if the judgment be recent, is not to move the court, upon affidavit of facts, to set aside the judgment for irregularity?

The tenant absconded, and the landlord took possession of the premises, and then brought an Ejectment, as for a vacant possession, in order to bar the tenant's right under the lease; the Court, on motion, set aside the proceedings, with costs, as a nullity, Ejectment not lying by a person already in possession. *Jackson ex dem. Clowes vs. Hukes*, 2 *Caines' Rep.* 335.

The plaintiff, if he proceed under the Statute, (*Sess. 36. Chap. 63. Sec. 23. 1 R. L.*, 440.) must show that there was no sufficient distress on the premises, or, if he proceed at common law, he must prove a demand of the rent. *Jackson ex dem. Van Rensselaer vs. Collins*, 11 *Johns. Rep.* 1.

But if the tenant deny the title of the lessor, and disclaim by parol to hold under him, it is a waiver of the necessity of the demand. *Ibid.*

It seems, that where the lease contains no clause of re-entry, the landlord cannot bring Ejectment under the statute. *Jackson ex dem. Van Rensselaer vs. Hogaboom*, 11 *Johns. Rep.* 163.

The want of sufficient distress on the premises must be at the time when the declaration in Ejectment is served. *Ibid.*

If a lessee, holding lands under a lease containing a clause of re-entry, in case of non-payment of rent, leave the premises, and persons claiming title under the lessor have been in possession for 14 years, since the departure of the lessee, a demand and re-entry by the lessor will be presumed. *Jackson ex dem. Goose & Al. vs. Demarest*, 2 *Caines' Rep.* 382.

A lease was executed in 1769, reserving rent, with a clause of re-entry for the non-payment of the rent, and the lessee died in 1775, without wife or children; and there being no evidence of a continuance of possession under him, or of payment of rent, and the lessor having taken possession in 1786; it was *Held*, in 1809, that a re-entry by the lessor for non-payment of rent, was to be presumed. *Jackson ex dem. Smith & Al. vs. Stewart*, 6 *Johns. Rep.* 34.

After a lapse of only nine years, a re-entry for the non-payment of rent, will not be presumed. *Jackson ex dem. Donally & Al. vs. Walsh*, 3 *Johns. Rep.* 226.

[2] A lease for lives contained a clause of re-entry, for non-payment of

served, that the lessor of the plaintiff had a right to re-enter, and that no sufficient distress was to be found upon the premises countervailing the arrears of rent then due: and, if the case require it, the affidavit must also go on to state, that the premises were untenanted, or that [ \*160 ] the tenant could not be legally served \*with the declaration, or as the facts may be, and that a copy of the declaration was affixed on the most notorious (stating what) part of the premises.(s)[1]

This affidavit is of course only necessary upon moving for judg-

(s) Appendix, No. 19.

rent; or, if the lessee should have the possession for *six* months, or not perform the covenants, &c. The tenant left the premises in 1810, and the landlord in *April*, 1811, executed another lease to the defendant, who entered and took possession of the premises, and the first lessee, who had paid no rent to his landlord, after the first of *May*, 1809, brought an action of ejectment in 1821, against the defendant, the second lessee, to recover the possession: *Held*, that the right of the tenant, (the first lessee,) could be barred only by a recovery in ejectment, under the statute; and that, if a *legal re-entry* was to be presumed, it would be a re-entry under the statute, rather than at common law; but that, in the absence of any record, or evidence of a re-entry or a recovery in ejectment, under the statute, such re-entry could not be presumed; and that a re-entry at common Law was not to be presumed, unless after a possession for 14 years, at least; And admitting that the landlord entered *six* months after his tenant had quitted the possession, that, alone, could not divest the apparent right of possession gained by the tenant, (or first lessee.) *Jackson ex dem. Myers vs. Ellesworth*, 20 *Johns. Rep.* 180.

[1] Where one of the conditions of the lease was, that the lessee should pay *all taxes, &c.*; *held*, that the lessor had no right to re-enter for a breach of the condition, without showing a demand of payment of the tax within the period required by law, in order to create a forfeiture. *Jackson ex dem. Welden vs. Harrison*, 17 *Johns. Rep.* 66.

Nor can the lessor re-enter on the ground of forfeiture for the non-payment of *rent*, without showing a demand of the rent due on the last day, from the tenant on the premises, a convenient time before sun set, &c. or a strict compliance with all the formalities, required by the common law; his claim being regarded *stricti juris*. *Ibid*.

Proving a demand of the rent of his tenant, at the house on the premises, in the afternoon of the last day, is sufficient. *Ibid*.

Where the lessor proceeds for a forfeiture, or to enforce a penalty, he must show a demand of the rent on the very day on which it was payable; but where the rent is payable on the land, and the lessor brings covenant, or proceeds by distress, to recover the rent, he need not show a previous

ment against the casual ejector, or after a nonsuit at the trial for the

demand, although the rent was payable on demand. *Remsen vs. Conklin*, 18 Johns. Rep. 447.

In the case of *Jackson ex dem Livingston vs Kip*. (3 Wend. Rep. 230.) The lessors of the plaintiff claimed to recover a farm for breach of conditions contained in an unexpired lease for lives of the premises, bearing date in 1795, executed by the ancestor of the lessors of the plaintiff to the father of the defendant, and under which he claimed title. The condition relied on was, that if the yearly rent should be behind and unpaid for the space of twenty days after the day appointed for its payment; and that if the lessee, his heirs, &c. should not observe, keep and perform the several covenants in the indenture of lease expressed to be performed by the lessee, &c. the indenture and the estate thereby created were to be void, &c., and a right of re-entry was given to the landlord, his heirs and assigns. One of the covenants in the lease was, that on every sale or assignment of the demised premises by the lessee, his heirs, &c. he or they should pay to the landlord, his heirs, &c. a fifth part of the consideration money of such sale or assignment.

The plaintiff proved, that in May, 1826, the rent due and in arrear amounted to the sum of \$122, and that in April, 1826, the property of the defendant was sold on execution. It appeared that at the time of the sale there was more than double the amount of property on the premises to satisfy the rent; and that property to the amount of \$150, purchased at the sale, was left on the premises, and continued there in the possession of the defendant at the time of the trial of the cause. It was not proved specifically that the estate of the defendant in the demised premises was sold under the execution. On this evidence a verdict was taken for the plaintiff, subject to the opinion of the Supreme Court.

By the Court, SAVAGE, C. J. "The plaintiff cannot sustain this action for the non-payment of rent, neither at common law nor under the statute. He cannot recover at common law, because he has not complied with the common law requirements, such as the demand of the precise amount of rent, on the day it fell due, at a convenient time before sun down. (7 T. R. 117. 1 Saund. 286, n. 16. Saund. on Pl. and Ev. 470.) Nor can this action be sustained under the statute, because there was abundant property on the premises countervailing the arrears of rent, and which might have been distrained.

"Nor can the plaintiff recover for a breach for the non-payment of the fifth of the sale of the premises. The case is rather obscure as to the sheriff's sale in April, 1826. It is not stated that the defendant's interest in the demised premises was sold; and if there was no sale, there could be no forfeiture on that ground. If there was a sale of the premises, then a question I apprehend would arise, whether such sale was *collusive*, or whether it was *bona fide* an adversary proceeding on the part of the creditor. If *collusive*, and made with intent to defeat the condition in the lease, then the plaintiff would be entitled to recover; but if *bona fide*, then, according to the opinion of Platt, justice, in *Jackson v. Silvernail*, (15 Johns. R. 279,) such sale does not work a forfeiture; and such was the point decided by this court in *Jackson ex dem. Schuyler v. Cortiss*, (7 Johns. R. 531,)



tenant's not confessing lease, entry, and ouster; but if the tenant appear, and the ejectment come to trial, the matters contained in the above affidavit must be proved. (1)

When a forfeiture has accrued upon a clause of re-entry for rent in arrear, such forfeiture will be waived, if the landlord do any act after the forfeiture which amounts to an acknowledgment of a subsisting tenancy; as if he receives rent due at a subsequent quarter, or distrain for that in respect of which the forfeiture accrued, [2] or receive the same and give a receipt for it as for so much rent, or in which he calls the party his tenant. It seems, however, according to the old authorities, that in case of a lease for years, the bare acceptance by the lessor at a subsequent day, of the rent, in respect of which the forfeiture accrued, although before ejectment brought, will not of itself, unless accompanied with circumstances which show an intention to continue the tenancy, bar him of his right to re-enter, because the rent is a duty due to him, and as well before as after re-entry, he may have an action of debt for the same on the contract between the lessor and lessee; but that in the case of a lease for life, the mere acceptance of such rent will be sufficient to affirm the lease, as the lessor could not receive it as [ \*161] due upon any contract, \*but must receive it as his rent; for when he accepted the rent he could not have an action of

(1) *Doe, d. Hitchings, v. Lewis*, Barr. 614, 20.

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"though an intimation to the contrary was thrown out by Mr. Justice Sutherland, in *Jackson v. Groat*, (7 Cowen. 286.) Upon the facts appearing "in this case, the defendant is entitled to judgment."

[2] Same Point, *Jackson ex dem. Norton vs. Sheldon*, 5 Cowen's Rep. 448.

To make a receipt for rent operate as a waiver of a forfeiture of the estate demised, the rent must not only be *received* after the forfeiture is incurred, but such rent so received must have *accrued* after that time. *Jackson ex dem. Blanchard vs. Allen*, 3 Cowen's Rep. 220.

And this validates the lease only to the time when the rent so received accrued; but will not operate as a waiver of a forfeiture incurred by continuing the original cause of the forfeiture after the day on which the rent received fell due. *Ibid.*

If the lessor is ignorant that a forfeiture has been incurred, acceptance of rent is not a waiver of it. *Jackson ex dem. Church v. Brownson*, 7 Johns. Rep. 227.

debt for it, but his remedy was by assize, if he had seisin, or distress.(u)

Where an ejectment was brought upon a proviso of re-entry for non-payment of rent, and the lessor also commenced an action of covenant for rent, accruing subsequently to the day of the demise in the ejectment, and the tenant paid into court the rent demanded in the action of covenant, the forfeiture was holden to be waived; but it seems doubtful, whether the commencement of the action of covenant was of itself sufficient to waive the forfeiture.(v)

It seems that a landlord will not waive his right of re-entry for a forfeiture, incurred by non-payment of rent, by taking an insufficient distress for that rent.(w)[1]

(u) *Green's case*, Cro. Eliz. 3. S. C. 1 Leon. 262. *Pennant's case* 3 Co. 64. *et vide Doe, d. Cheney, v. Batten*, Cowp. 243.

(v) *Doe, d. Crompton, v. Minshul*, B. N. P. 96. S. N. P. 659.

(w) *Brewer, d. Lord Onslow, v. Eaton*, cited in *Goodright, d. Charter, v. Cordoent*, 5 T. R. 226. It may be useful to notice in this place a provision of the legislature in one particular case of rent in arrear, although it does not strictly belong to a treatise on ejectment. By the statute 11 Geo. II. c. 19. s. 16. after reciting, that landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to be uncultivated without any distress thereon, whereby the landlords or lessors might be satisfied for the rent in arrear; but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expense and delay of recovering them in ejectment, it is enacted, "That if any

"tenant holding any lands, tenements, or  
"hereditaments, at a rack rent, or where the  
"rent reserved shall be full three-fourths of  
"the yearly value of the demised premises,  
"who shall be in arrear for one years' rent,  
"shall desert the demised premises, and  
"leave the same uncultivated or unoccupied,  
"so as no sufficient distress can be had to  
"countervail the arrears of rent; it shall and  
"may be lawful, to and for two or more jus-  
"tices of the peace of the county, riding, di-  
"vision, or place, (having no interest in the  
"demised premises,) at the request of the  
"lessor or landlord, lessors or landlords, or  
"his, her, or their bailiff or receiver, to go  
"upon and view the same, and to affix, or  
"cause to be affixed, on the most notorious  
"part of the premises, notice in writing, what  
"day (at the distance of fourteen days at  
"least) they will return to take a second view  
"thereof; and if upon such second view the  
"tenant, or some person on his or her behalf,

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[1] Where a landlord had distrained for rent in arrear, though the distress was insufficient to satisfy it, it was *Held*, that he could not afterwards bring ejectment on account of the same rent, upon the clause of re-entry under the 23d section of the Statute concerning *Distresses, Rents, and the Renewal of Leases*. (1 R. L. New-York. 440, 441.) And that the act of distraining waives the forfeiture. *Jackson ex dem. Norton vs. Sheldon*, 5 Cowen's Rep. 448.

[ \*162 ] \*With respect to provisoes for re-entry upon the breach of other conditions, no general principle can be laid down, excepting that which arises out of the maxim of our law that every doubtful grant shall be construed in favour of the grantee; namely, that the breach complained of must come within the very letter of the covenant, or the lease will not be forfeited; and the clearest method of showing the application of this principle will be by giving a short digest of the cases upon the subject.

Where the lessee covenanted with the lessor not to *assign* his term without the lessor's consent, and afterwards *devise* his term without such consent, it was holden not to amount to a forfeiture, for a *devise* is not a *lease*. (x)

[ \*163 ] \*Where the lessee covenanted not to demise, assign, transfer, or set over, or *otherwise do or put away* the indenture of demise, or the premises thereby demised, or any part thereof, to any person or persons whatsoever, and afterwards made an *under-lease* of the premises, it was held not to be a breach of the covenant, or a forfeiture of term, for an *under-lease* is not an *assignment*. And it was said by the Court, in answer to an argument, that although an *under-lease* did not amount to an *assignment*, yet that it was a *transferring, setting over, doing, or putting away, with the premises*; that the Courts have always looked nearly into these conditions, covenants, and provisoes; that the devising a term *was a doing or a putting it away*; so being in debt by confessing a judgment, and having the term taken in execution was the like; but that

"shall not appear, and pay the rent in arrear,  
"or there shall not be sufficient distress upon  
"the premises; then the said justices may  
"put the landlord or landlords, lessor or lessors,  
"into the possession of the said demised premises;  
"and the lease thereof to such tenant, as to any demise therein contained  
"only, shall from thenceforth become void."

SECT. 17. "Provided always, that such proceedings of the said justices, shall be examinable in a summary way, by the next justice or justices of assize, of the respective counties in which such lands or premises lie; and if they lie in the city of London, or county of Middlesex, by the judges of the courts of King's Bench, or Common Pleas; and if in the counties palatine, of Chester, Lancaster, or Durham, then before

"the judges thereof; and if in Wales, then before the courts of grand-sessions respectively; who are hereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs, to be paid by the lessor, or landlord, lessors or landlords, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs, not exceeding five pounds, for the frivolous appeal." The provisions of this statute, however, like those of 4 Geo. II. c. 28. are holden to extend only to cases where the landlord has a right of re-entry reserved to him by the demise. Wood. L. & T. 523.

(x) Fox, v. Swan, Sty. 482.

none of these amounted to an *assignment*, or to a breach of the covenant, or condition.(y)[1]

It seems to have been once holden, that if a lessee for years grant the lands to another for the whole term he has therein, but reserve the rent payable to himself, and not to the original lessor, it will be a lease, and not an *assignment*, notwithstanding the want of a [\*164] reversion in the party so granting; but this doctrine, if the decision were as reported, has since been overruled.(z)

Where the lease contained a proviso, that the lessee should not set, *let*, or assign *over*, the whole, or any part of the premises, without leave in writing, on pain of forfeiting the lease, it was held that the lessee could not *underlet* without incurring a forfeiture; because, the word *over* was annexed only to the word *assign*; and, therefore, the condition was broken, if the lessee *let* the premises, or any part of them, for any part of the time.(a)[1] And where the proviso was not to assign, or *otherwise*

(y) *Crusoe, d. Blancoe, v. Bugby*, 3 Wils. 284.

(z) *Poultney v. Holmes*, Stran. 405. *Palmer v. Edwards*, Doug. 187, *in notis*. It seems from these cases, that a parol assignment of the whole term, which is void by the statute of frauds, will be good as an under-lease; but

quare if the tenancy thereby created does not enure as a tenancy from year to year, and not as a tenancy for the residue of the term. *Vide Doe, d. Rigge, v. Bell*, 5 T. R. 471. *Clayton v. Blakey*, 8 T. R. 2.

(a) *Roe, d. Gregson, v. Harrison*, 2 T. R. 425.

[1] Where a lessee for lives covenanted not to sell, dispose of, or assign his estate in the demised premises, without the permission of the lessor, &c. and the lease contained a clause of forfeiture for non-performance of covenants; *held*, that a lease of part of the premises by the lessee for twenty years, was not such a breach of the covenant; and that nothing short of an assignment of his whole estate, by the lessee, would produce a forfeiture of the lease. *Jackson ex dem. Stevens v. Silvernail*, 15 Johns. Rep. 278. & *Vide Jackson ex dem. Livingston vs. Groat*, 7 Cowen's Rep. 285, 287.

Nor would a sale of the whole premises under a judgment and execution against the lessee, work a forfeiture, there being no evidence of any fraud or collusion on the part of the lessee. *Ibid*.

So, where a lease for the *term of seven years*, contained a like covenant, that the lessee, "should not assign over, or otherwise part with the indenture, or the premises thereby leased, or any part thereof," &c., and there was a clause of re-entry for a breach of covenants; *held*, that no forfeiture was incurred by an underletting for two years. *Jackson ex dem. Welden v. Harrison*, 15 Johns. Rep. 66.

[1] If it be covenanted in a lease, "that in case the lessee should suffer or permit more than one person to every hundred acres, to reside on, use, or occupy any part of the premises, the lease should be void," and the les-

part with the premises, for the whole, or any part, of the term, the proviso was held to be broken by an under-lease, as well as by an assignment.(b)

[\*165] \*Where a lease contained a proviso for re-entry, in case the tenant should demise, or let the demised premises, or any part thereof, for all or any part of the term without license,[1] and the tenant without license agreed with a person to enter into partnership with him, and that he should have the use of certain parts of the premises *exclusively*, and of the rest jointly with him the tenant, and accordingly let him into possession; it was held that the lease was forfeited thereby; for that it was a parting with the exclusive possession of some part of the demised premises, and whether it were gratuitously, or for rent reserved, was immaterial.(c)

A covenant not to underlet any part of the premises without license, is not broken by taking in lodgers;[2] for, *per Lord Ellenborough, C. J.* "The covenant can only extend to such underletting as a license might be expected to be applied for, and whoever heard of a license from a landlord to take in a lodger?"(d)

Where the lessee enters into covenants not to assign,[3] &c. the courts

(b) *Doe, d. Holland, v. Worsley*, 1 Campb. 20.

(c) *Roe, d. Dingley, v. Sales*, 1 M. & S. 297.

(d) *Doe, d. Pitt, v. Lawing*, 4 Campb. 77.

see lets part of the premises to persons for a year, to cultivate for shares, in the proportion of more than one to each hundred acres, it is a breach of the condition, and defeats the lease. *Jackson ex dem. Colden v. Brownell*, 1 Johns. Rep. 267. *Jackson ex dem. Colden v. Rich*, 7 Johns. Rep. 194.

But where the quantity of land demised was 135 acres, and a like covenant in the lease, it is not a breach for the lessee to permit another tenant besides himself to occupy the premises. *Jackson ex dem. Colden v. Agan*, 1 Johns. Rep. 273.

[1] If the lease contain a covenant that the lessee shall not assign without the permission of the lessor, and the lessee do assign part of the premises with the consent of the lessor, it is not a surrender, but the lessee still remains liable for every act of the assignee, amounting to a breach of the covenants contained in the lease. *Jackson ex dem. Church v. Brownson*, 7 Johns. Rep. 227.

[2] Letting land upon shares, for a single crop, does not amount to a lease of the land, and the owner alone can bring trespass. *Bradish v. Schenck*, 8 Johns. Rep. 151.

[3] In Ejectment on a clause of re-entry, in case the tenant should as-

will distinguish between those acts which are done by him voluntarily, and those which pass in *\*invitum*, and will not hold [ \*166 ] the latter to be a breach of the covenant. Thus, if the lessee become bankrupt, and the term be assigned under the commission, no forfeiture will be incurred ;(e) unless, indeed, there be an express stipulation in the proviso that it shall extend to the bankruptcy of the lessee.(f) And where a lessee who had covenanted not to " let, set, assign, transfer, make over, barter, exchange, or otherwise part with, the indenture," with a proviso, that in such case the landlord might re-enter, afterwards gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold ; it was held to be no forfeiture of the lease, unless the warrant of attorney were given expressly for the purpose of having the lease taken ; for judgments, in contemplation of law, always pass in *invitum*. And Lord *Kenyon*, C. J. said, " there was no difference between a judgment obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney ; since the latter is merely to shorten the process, and lessen the expense of the proceedings : " but if the warrant of attorney be expressly given for the purpose of having the lease taken in execution, it will be held to be in fraud of the covenant, and a forfeiture of the lease.(g)[1]

(e) *Doe, d. Goodbaker, v. Bevan*, 3 M. & S. 353.

(g) *Doe, d. Mitchinson, v. Carter*, 8 T. R. 57. 300.

(f) *Roe, d. Hunter, v. Galliers*, 2 T. R. 153.

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sign, set over, or otherwise let the demised premises, it is not sufficient to prove the defendant, a stranger, in possession of the demised premises, and his declaration that they were demised to him by another stranger. *Doe vs. Payne*, 1 *Starkie's Rep.* 86.

And such evidence would not be sufficient even if the tenant had covenanted not to part with the possession. *Ibid.*

[1] A lessor reserved one quarter of the money arising from every letting, assigning or disposing of the premises by the lessee, who covenanted, that whatever he should incline, or be by law, or otherwise, obliged to sell, &c., he would make the first offer to the lessor, giving him notice of the price, &c ; and it was provided, that every sale, renting, &c. should be void, and the premises revert to the lessor, unless the seller or purchaser should pay the lessor the one fourth of the money offered, &c. The tenant who held under the lease confessed a judgment, on which an execution issued, and the lease was sold by the sheriff: held that this was not a forfeiture, unless the judgment had been confessed fraudulently, or for the purpose of enabling the creditor to take the lease in execution under the judgment, and with a view to defeat the lessor's reservation of one fourth of the money offered. *Jackson ex dem. Schuyler v. Corkiss*, 7 *Johns. Rep.* 531.

[ \*167 ] This protection extends also to the party, to whom the \*term is by law assigned. The reason of this is, that such assignee cannot be encumbered with the engagement belonging to the property which he takes, but must be allowed to divest himself of it and convert it into a fund for the benefit of the creditors; and, therefore, a forfeiture is not incurred, if the assignee sell the term.(h)

But where one leased for twenty one years, "If the tenant, his executors, &c. should so long continue to inhabit and dwell in the farmhouse, and *actually occupy* the lands, &c. and not let, set, assign over, or otherwise depart with the lease," the tenant having become bankrupt, and his assignees having possessed themselves of the premises, and sold the lease, and the bankrupt being out of the possession and occupation of the farm, it was held, that the lessor might maintain ejectment. And this case was distinguished from the one just mentioned, as not being a case of forfeiture; but one in which the term itself was made to continue and depend upon the personal occupation of the lessee, and that therefore the term itself ceased, when the lessee had no longer the occupation of the farm.(i)

Where a lease contained an exception out of the demise of all trees then growing, or thereafter to grow upon the demised premises, and also a proviso, that if the defendant should commit any waste in or upon the said demised premises, it should be lawful for the lessor to re-enter; it was held to be no forfeiture of the lease, to cut down the trees excepted; for that waste could only be committed of the thing demised, [ \*168 ] and those trees being excepted out of the demise, \*no waste could be committed of them, and consequently no forfeiture, within the provision of the lease, could be incurred by cutting them down.(j)[1]

(h) *Doe, d. Goodbehere, v. Bevan*, 3 M. & S. 258.

(j) *Goodright, d. Peters, v. Vivian*, 8 East 190.

(i) *Doe, d. Lockwood, v. Clarke*, 8 East, 185.

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[1] Where a jury would not be warranted by the evidence in an action under the Statute for Waste, to find a verdict for the plaintiff, a judge is not authorised, in an action of Ejectment founded on an alleged forfeiture for waste, to instruct a jury that the acts complained of, simply because done without the permission of the landlord, work a forfeiture of the tenant's right: He should submit the question to the jury to determine whether the acts done were in fact prejudicial to the plaintiff's interest. *Jackson ex dem. Thomas vs. Tibbits*, 3 Wend. Rep. 341.

A covenant, "not to use or exercise, or permit, or suffer, to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever," is broken by an assignment to a schoolmaster, who kept his school upon the premises.(k)

Where a lease contained a covenant "to insure and keep insured a given sum of money upon the premises during the term, in some sufficient insurance office," the covenant was interpreted, by reasonable intendment, to mean insurance against fire; and the lessee, having insured the proper sum, but omitted to pay the annual premium within the time allowed by the office for payment, was held to have forfeited his lease upon a clause of re-entry, although he paid the premium within fourteen days after such time, and no action had been commenced, and no accident had happened by fire to the premises, in the mean time.(l) But where, in pursuance of a similar covenant, the lessee effected an insurance (the policy containing a memorandum, that in case of the death of the assured, the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death,) and died, and the representative, after the three months had expired, but before ejectment brought, obtained the proper indorsement, Lord *Ellenborough*, C. J. was of opinion that the policy did not become void for want of the indorse- [\*169] ment within the three months, but at most was only voidable by the company, and ruled, that no forfeiture was incurred.(m)

A covenant in a lease to deliver up at the end of the term all the trees standing in an orchard at the time of the demise, "*reasonable use and wear only accepted*," is not broken by removing trees decayed and past bearing, from a part of the orchard which was too crowded.(n)

A lease with a clause of re-entry, for non-performance of covenants contained a general covenant on the part of the lessee, to keep the premises in repair; and it was further stipulated by another independent covenant, that the lessee, within three months, from the time of a notice to repair being served upon him by the landlord, should repair all the

(k) *Doe, d. Bish, v. Keeling*, M. & S. 95.

(m) *Doe, d. Pitt, v. Laming*, 4 Campb. 76.

(l) *Doe, d. Pitt, v. Sherwin*, 3 Campb. 134.

(n) *Doe, d. Jones, v. Crouch*, 2 Campb. 442.

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*It seems, that if the waste be committed in a dwelling house, part of the property demised, only such parts of the dwelling house are forfeited as the waste is committed in. Ibid.*



defects specified in the notice; the landlord, after serving him with a notice to repair, was allowed to bring an ejectment against him within three months, for a breach of the general covenant to repair.(o)

Where a lease, rendering rent, contained a covenant that the lessee should not assign without leave of the lessor, after which covenant was a proviso, that if the rent should be in arrear, or if all or any of the covenants *thereinafter* contained on the part of the lessee, should be broken, it should be lawful for the lessor to re-enter, and there were [ \*170 ] \*no covenants on the part of the lessee after the proviso, but only a covenant by the lessor, that the lessee paying rent, and performing all and every the covenants *thereinbefore* contained on his part to be performed, should quietly enjoy; it was held that the lessor could not re-enter for breach of the covenant not to assign, the proviso being restrained by the word "*hereinafter*" to subsequent covenants; and although there were none such, yet the court could not reject the word.(p)

Where a beneficial long lease reserved to the lessee the liberty to cut down and dispose of all timber, &c. then growing, or thereafter to grow during the term, subject to the following proviso, that *when and so often as* the lessee should intend, during the term, to fell timber, &c. he should immediately give notice in writing to the lessor of such intention, who should thereupon have the option of purchasing it, with a power of re-entry, in case of a breach of this proviso, and the lessee, soon after the execution of the lease, (at that time intending *bona fide* to cut down the whole of the then growing timber,) gave the proper notice in writing to the lessor, who did not accept the purchase, but disclaimed it; the lease was not forfeited, although the lessee did not forthwith fell all the timber, &c. but proceeded to cut down the same in different seasons, at his own convenience, without giving any fresh notices to the less- [ \*171 ] or, \*or his assignee, to whom he had, previously to the last cuttings, conveyed his interest.(q)

In all these cases, the tenancy was created by deed; but the principle is the same if the tenant holds under an agreement for a lease, which

(o) *Roe, d. Gostley, v. Paine*, 2 Campb. 530.

(p) *Doe, d. Spencer, v. Godwin*, 4 M. & S. 265.

(q) *Goodtitle, d. Luzmore, v. Saville*, 16

East, 87. Lord Ellenborough, C. J., and Le Blanc, J., intimated an opinion, that a Court of equity would probably, under the circumstances, give the lessor or his assignee a new option to purchase.

specifies the covenants to be inserted in the lease, and that there shall be a power of re-entry for a breach of them.(r)

Next of the means by which a covenant may be dispensed with.

To enable a reversioner(s) to take advantage of a forfeiture, it is necessary that he should have the same estate in the lands at the time of the breach, as he had when the condition was created ; an extinguishment of the estate in reversion, in respect of which the condition was made, extinguishing the condition also.(t) Thus, where a lease was made for a hundred years, and the lessee made an under lease for twenty years, rendering rent, with a clause of re-entry, and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the \*term, it was holden, that the [\*172] grantee should not have, either the rent, or the power of re-entry ; for the reversion of the term to which they were incident was extinguished in the reversion in fee.(u)

The reversioner must also be entitled to the reversion, at the time the forfeiture is committed, or he cannot take advantage of it.(v)

When the condition is, that the lessee will not do any particular act without leave from his lessor, if leave be once granted, the condition is gone for ever ; for the condition is to be taken strictly, and by the license it is satisfied.(w) And, in like manner, when a condition is entire, a license to dispense with a part of the condition is a dispensation of the whole. As where the lease contains a clause, that the lessee shall not assign without leave from his lessor, the lessee, under a license to assign part of the premises, may assign the whole without incurring a forfeiture.(x) But the license must be such as is required by the lease ; and, therefore, where the lease required the license to be in writing, a parol license was held to be insufficient.(x)

Provisoes for re-entry are also construed strictly with respect to the parties who may take advantage of them, and only include the persons

(r) *Doe, d. Oldershaw, v. Breach*, 6 Esp. 108.

(s) For covenants upon which the assignee of reversion may sue Vide ante 74.

(t) *Dumper's case* 4 Co. 120(b).

(u) *Thre's v. Barton*, Moore, 94. *Webb v. Russell*, 3 T. R. 388. 402.

(v) *Fenn, d. Matthews, v. Smart*, 12 East, 444.

(w) *Dumper, v. Syme*, Cro. Eliz. 815. S. C. 4 Co. 119(b)

(x) *Rot, d. Gregson, v. Harrison*, 2 T. R. 425. *Seers v. Hlad*, 1 Ves. jun. 294.

who are expressly named. Thus, a power for C. to enter will [\*173] not extend to his execu-\*tor.(x) And it seems, also, that if a lessee covenant with his lessor, that *he* will not assign, &c. a covenant so framed will not extend to his executors or administrators, although if the executors or administrators be mentioned in the clause, they will be bound by it.(y)

A power of re-entry cannot be reserved to a stranger;(z) and where, in a building lease, a trustee and his *cestui que trust* were both demising parties, and the power of re-entry was reserved to both, and the state of the title appeared in the recitals in the lease, the court, without argument, held the proviso to be void.(a)

A forfeiture of a lease for a breach of covenant may be waived, as well as a forfeiture for non-payment of rent, or a notice to quit, that is to say, if the landlord do any act, with knowledge of the covenant being broken, which can be considered as an acknowledgment of a tenancy still subsisting; as, for example, if he receive rent accruing subsequently to the forfeiture,(b) unaccompanied by circumstances which show a contrary intention.(c) But where a right of entry was given in three months after notice of the premises being out of repair, and the landlord gave notice, and after the three months had expired, accepted rent accruing after such expiration, and then brought an ejectment, the premises being still out of repair, Lord *Kenyon*, C. J. was of opinion that the right of re-entry was only waived up to the period for [\*174] which the rent was received, \*and that the lessor was entitled to recover, upon a demise laid subsequently to that time. The jury, however, found a verdict for the defendant, and the court afterwards discharged a rule, which the lessor of the plaintiff obtained in the next term, for a new trial.(d)[1]

(x) *Hassel, d. Hodson, v. Gouthwaite*, Willes, 500.

(y) *Roe d. Gregson, v. Harrison*, 2 T. R. 426. *Seers v. Hinde*, 1 Ves. jun. 294.

(z) *Co. Litt.* 214.

(a) *Doe, d. Barber, v. Lawrence*, 4 Taunt. 23.

(b) *Fox, v. Swann*, Styles, 482. *Goodright, d. Walter, v. Davids*, Cowp. 803.

(c) *Ante*, 139.

(d) *Fryett, d. Harris, v. Jeffreys*, 1 Esp. 393.

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[1] Where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant, and the premises being out of repair, the landlord

But a waiver of one forfeiture incurred by breach of covenant, will not be a waiver of a second forfeiture incurred by another breach of the same covenant. And, therefore, where a right of re-entry was reserved on a breach of covenant not to under let, it was held, that the lessor was entitled to re-enter upon a second under-letting, although he had waived his right so to do upon the first.(e) It is also necessary that some positive act of waiver should take place. The landlord will not lose his right to re-enter, by merely lying by, (however long the period,) and witnessing the act of forfeiture; but it seems, that if, with full knowledge thereof, he permits the tenant to expend money in improvements, it is a circumstance from which the jury may presume a waiver, as well as ground for application to a court of equity for relief.(f)

It seems scarcely necessary to observe, that no act of the landlord will operate as a confirmation of a lease, rendered voidable by a breach of covenant, unless he had full notice at the time of such act, that the forfeiture had been committed.(g)[2]

Before quitting this branch of our subject, it is necessary to notice a material distinction which prevails between *leases* [\*175] for *lives*, and leases for *years*, as to the consequences of a forfeiture, when the proviso, upon which the forfeiture occurs, declares the lease "*to be null and void*," or, "*to cease and determine*," &c. upon the breach of the condition, instead of being expressed in the common form, "*that it shall and may be lawful for the lessor, in such case to re-enter*." In leases for lives, whatever may be the words of the condition, it is in all cases held, that if the tenant be guilty of any breach of the condition of re-entry, the lease is voidable only, and not void; and, therefore, not

(e) *Doe, d. Boscawen, v. Bliss*, 4 Taunt. 786.

(g) *Roe, d. Gregson, v. Harrison*, 2 T. R. 425.

(f) *Doe, d. Sheppard, v. Allen*, 3 Taunt. 78.

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gave notice to repair within three months: *Held*, that this was a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring Ejectment until after the expiration of the three months. *Doe ex dem. Morecraft & Al. vs. Meux & Al.* 4 Barnew. & Cress. Rep. 606.

[2] *Vide ANTE*, Page 160, n. [2].

determined until the lessor re-enters, that is, brings an ejectment for the forfeiture. Because, when an estate commences *by livery*, it cannot be determined before *entry* ;[1] and; consequently, if the lessor do any act which amounts to a dispensation of the forfeiture, the lease, which before was voidable only, is thereby affirmed, and the forfeiture waived. But when clauses of the same import, as those first above mentioned, are inserted in leases for years, if the lessee be guilty of any breach of the condition of re-entry, the lease becomes absolutely void, and determined thereby ; and cannot be again set up by any subsequent act of the lessor. When, however, a lease for years contains the common proviso, namely, "*that it shall and may be lawful for the lessor to re-enter,*" or a proviso, "*that the term shall cease and determine, if the lessor please,*"(h) the lease will be only voidable by a breach of covenant ; and the forfeiture may then be waived by a subsequent acknowledgment of a tenancy, in the same manner as is in all cases of leases for lives.(i)

[ \*176 ] A proviso in a lease to re-enter for a condition broken, \*operates only during the term, and cannot be taken advantage of after its expiration. Thus, where a lease for ninety-nine years, if *A.* and *B.* should so long live, was granted, with a proviso giving the power of re-entry, in case the lessee should under-let the premises for the purpose of tillage, and an under-tenant of the lessee ploughed up, and sowed the land, but the lessor did not enter during the continuance of the estate ; it was held in an action of trespass by the lessor against the under-tenant, for entering upon the land, after the determination of the estate, for the purpose of carrying off the emblements, that the plaintiff, having never been in possession by *right of re-entry* for condition broken, could have no advantage thereof, and that the defendant, who ploughed and sowed the land, was entitled to take the emblements.(j)

(h) *Doe, d. Bristol, v. Old*, K. B. Sittings after T. T. 1814. M. S.

(i) Co Litt. 215,(a). *Pennant's case*, 3 Co. 64, 65.

(j) *Johns v. Whitley*, 2 Wils. 127.

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[1] Where there is a forfeiture of an estate of freehold upon condition, for non-payment of an annuity, if the grantor subsequently accept the sum due, such acceptance is in law a waiver of the forfeiture ; and a forfeiture once waived can never afterwards be claimed. *Chalker vs. Chalker*, 1 *Connect. Rep.* 79.

## CHAPTER VI.

OF THE ANCIENT PRACTICE; AND THE CASES IN WHICH IT IS  
STILL NECESSARY.

WHEN the remedy by ejectment is pursued in an inferior court, the fictions of the modern system are not applicable, for inferior courts have not the power of framing rules for confessing lease, entry, and ouster, nor the means, if such rules were entered into, of enforcing obedience to them. (k) When, also, the premises are vacated, and wholly deserted by the tenant, and his place of residence is unknown, (l) the modern practice, for reasons which will be noticed in a subsequent chapter, (m) cannot be adopted. When, therefore, the party brings his action in a superior court, the possession being vacant (n) and the lessor's \*abode unknown, and when he is desirous of trying his title in [ \*178 ] a court of inferior jurisdiction, all the forms of the ancient practice must be observed: [1] a lease must be sealed upon the premises; an ouster actually made; and the parties to the suit will be real, and not imaginary persons.

(k) *The King v. Mayor of Bristol*, 1 Keb. 690. *Sherman, v. Cocke*, 1 Keb. 795. It is said by *Gilbert*, C. B. that if the defendant in an inferior court, enter into a rule to confess lease, &c. and the cause be removed, and the judge of the inferior court grant an attachment against the defendant for disobedience to the rule, the superior court will grant an attachment against the judge, for exceeding his authority, and obstructing the course of the superior court. (*Gilb. Eject.* 88.)

(l) Strict proof of this fact will be required;

and if it appear, that the premises were not wholly deserted, or that the plaintiff's lessor knew where the tenant lived, a judgment obtained by means of the ancient practice will be set aside. A very little matter has been held sufficient to keep possession, such as, leaving beer in a cellar, or hay in a barn. (*Savage v. Dent*, Stran. 1064. *Jones, d. Griffiths, v. March*, 4 T. R. 464.)

(m) Chap. VII.

(n) Appendix, No. 7.

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[1] The principles, as to the proceedings for a vacant possession in England, do not apply to unsettled lands in this country. *Saltonstall vs. White*, 1 Johns. Cas. 221. *Same Case. Cole. Cas.* 86.

The manner of proceeding in these cases is as follows. *A.*, the party claiming title, must enter upon the land before the essoign-day of the term of which the declaration is to be entitled, and whilst on the premises, execute a lease of them to *B.* (any person<sup>(o)</sup> who may accompany him,) at the same time delivering to him the possession by some one of the common modes. *C.* (some other person) must then enter upon the premises, and eject *B.* therefrom; and having done so, must remain upon them, whilst *B.* delivers to him a declaration in ejectment, founded upon the demise contained in the lease; and, in all respects, like the declaration in the modern proceedings,<sup>(p)</sup> except that the parties to it are real instead of fictitious persons; *B.* being made the plaintiff, *A.* the lessor, and *C.* the defendant. To this declaration, a notice must be added, signed by *B.*'s attorney, and addressed to *C.*, requiring him to appear and plead to the declaration, and informing him that if he do not, judgment will be signed against him by default.<sup>(q)</sup>

[ \*179 ] \*When the landlord, or person claiming title, does not wish to go through this ceremony himself, he may execute a power of attorney, authorizing another to enter for him;<sup>(r)</sup> and the proceedings are then the same as if he himself entered. But it must be remembered, that if it be necessary, when the ancient practice is used, to join the wife in the demise, the lease must be executed by the husband and wife, in their proper persons, because a *feme covert* cannot constitute an attorney.<sup>(s)</sup>

When the ancient practice is resorted to, the suit must proceed in the name of the casual ejector, and if the proceedings are in a superior court, no person claiming title will be admitted to defend the action. If, therefore, in such case, the right to the premises be disputed, the party who seals the lease must, in the first instance, recover the possession, and the other party must afterwards bring a common ejectment against him, to try the title.<sup>(t)</sup>

(o) Attornies form an exception to this statement; for, by the rules of B. R. and C. B. (M. T. 1654.) it is ordered "that for the prevention of maintainance and brocage, no attorney shall be lessee in an ejectment."

(p) Appendix, No. 12.

(q) Appendix, No. 8.

(r) Sell. Pra. 131. Appendix, Nos. 5 and

(s) *Wilson v. Rich*, 1 Yelv. 1. S. C. 1 Brown, 134. *Plover v. Hockhead*, 2 Brown 248. S. C. Noy. 133. *Sed Vide Hopkins' case* Cro. Car. 165. *Gardiner v. Norman* Cro. Jac. 617.

(t) *Ex parte Beauchamp and Burt*, Barn. 177, B. N. P. 96.

When the proceedings are in the King's Bench, an affidavit must be made<sup>(u)</sup> of the sealing of the lease, ouster of the plaintiff, &c.; and upon this affidavit a motion is made for judgment against the defendant, and unless he appears and pleads, judgment will be signed against him, upon moving the court, as in a common ejectment.<sup>(v)</sup>

In the Common Pleas, this affidavit and motion are unnecessary, and instead of them a rule to plead must be given \*on [ \*180 ] the first day of term, as in other actions, and if there be no appearance and plea at the expiration of the rule, judgment may be signed.<sup>(w)</sup>

It is immaterial, as far as the forms of sealing the lease, &c. are concerned, whether the action be commenced in a superior, or inferior court; but the subsequent proceedings in inferior courts must, of course, depend upon the general practice in them in other actions, and cannot form a part of this treatise. How far it may even be *necessary* to give the tenant in possession notice of the claimant's proceedings, in an ejectment brought in an inferior court, may appear doubtful, when it is remembered, that such notice was only requisite in the superior courts, in consequence of a rule made for that particular purpose;<sup>(x)</sup> but it certainly is more *prudent* to conform to the general practice in this respect, and the notice need not to be given until after the entry, and execution of the lease.<sup>(y)</sup>

It seems, that an ejectment cannot be removed from an inferior to a superior court, except by a writ of *habeas corpus*; but it is difficult to discover the principle, upon which the writ of *certiorari* is considered insufficient.<sup>(z)</sup>[1]

(u) Appendix, No. 9.

(v) *Smartley v. Henden*, 1 Salk. 255. 2 Sell. Prac. 131.

(w) 2 Sell. Prac. 131.

(x) Ante, 11.

(y) 1 Lill. Pr. Reg. 675.

(z) *Higmore v. Barlow*, Barn. 421. *Allen v. Foreman*, 1 Sid. 313.

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[1] An Ejectment brought in an inferior court on a lease executed and sealed on the premises, which were within the jurisdiction of that court, may be removed into this court by *Certiorari*, if there be any ground for believing that it cannot be impartially tried in the inferior court. *Patterson ex dem. Gradridge & Al. vs. Eades*, 3 Barnew & Cress. Rep. 550..

A *Certiorari* will lie to remove an Ejectment from an inferior court. *Dos dem. Sadler vs. Dring*, 1 Barnew. & Cress. Rep. 253.



When an ejectment is removed from an inferior to a superior court, the tenant in possession is entitled to the same privilege of confessing lease, entry, and ouster, and defending the action, as if the plaintiff had originally declared in the superior court.(a)

[\*181] When the lands lie partly within and partly without the jurisdiction of the inferior court, the defendant cannot plead above the jurisdiction of such inferior court, because the demise is transitory, and may be tried any where.(b)

As the plaintiff, in the ancient practice, is a person actually in existence, his death would, of course, abate the action according to the general rules of law; but as the courts look upon the lessor of the plaintiff to be the person concerned in interest, they will not suffer him to be deprived of his remedy, by such an event. If, therefore, there be any one of the same name with the plaintiff, he will be presumed to have been the person; and it has also been held to be a contempt of the court, to assign for error the nominal plaintiff's death.(c)

In like manner, before the introduction of the modern practice, it was said, that if the plaintiff released to one of the tenants in possession, who had been made defendant, such release would be a good bar,[1] because the plaintiff could not recover against his own release, since he was the plaintiff upon the record; but the courts considered such a release as a contempt, and it does not appear that a plea of this nature ever occurred in practice.(d)

(a) *Glibb. Eject.* 37.

(b) *Hall v. Hughes*, 2 Keb. 68.

(c) *Moore v. Goodright*, Stran. 889.

(d) *Peto v. Checy*, 2 Brown, 128. *Anon.* Salk. 260. *Vide Doe, d. Byne, v. Brewer*, 4 M. & S. 300.

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[1] A release by one of two lessors of the plaintiff is no bar to a recovery in an Action of Ejectment, such release affecting only the quantum of interest. A release by a sole lessor is a bar here, though held otherwise in *England*. *Jackson ex dem. Hallenbeck & Al. vs. M'Clasky*, 2 *Wend. Rep.* 541.

A conveyance by the plaintiff's lessor, during the pendency of an action of Ejectment, can operate only upon his reversionary interest, and cannot extinguish the prior lease. The existence of such lease is a fiction, but is upheld for the purposes of justice. If it expire during the pending of a suit, the plaintiff cannot recover his term at law, without procuring an enlargement of it by the Court; and can proceed only for antecedent damages. *Robinson vs. Campbell*, 3 *Wheat. Rep.* 212.

The casual ejector is, also, in the ancient practice a real person, but the court will not allow him to confess judgment; and where, upon proceedings on a vacant possession, the casual ejector gave a warrant of attorney for this purpose, the court set the judgment aside.(e)

Where an action of ejectment, and an action of assault \*and [ \*182 ] battery, were joined in the same writ, after verdict it was moved in arrest of judgment, because it was without precedent; but the court seemed to think the misjoinder cured by the verdict.(f)

(e) *Hooper v. Dale*, Stran. 531.

(f) *Bird v. Snell*, Hob. 249. *et vide* Gilb. Eject. 52.

## CHAPTER VII.

OF THE DECLARATION IN THE MODERN ACTION OF EJECTMENT,  
AND NOTICE TO APPEAR.

THE proceedings in the modern action of ejectment being founded in fiction, and regulated altogether by the courts of common law, a system of practice has gradually been formed, adapted to the uses of the particular remedy, but for the most part independent of the general practical regulations in other actions. The singularity of the modern practice has, indeed, occasioned it to be denominated a string of legal fictions; and the remedy itself has frequently been called a child and creature of the Court.

To enable a party claiming title to lands, to take advantage of the modern method of bringing an ejectment, it is necessary, as we have already observed, (g) that a person should be in possession of the premises in question; that is to say, that they should not be vacated *and altogether deserted*; (h) or at least (supposing them to be so deserted) that the residence of the last tenant be not unknown to the claimant. (i) This arises from a particular regulation of the modern practice, [ \*184 ] which requires an affidavit of the service of a declaration in ejectment upon the tenant in possession, before judgment can be obtained against the casual ejector; and as this service cannot, of course, take place, when a tenant does not exist, the necessary affidavit cannot then be made, but the claimant is compelled to resort to the ancient practice.

(g) *Ante*, 177.

(h) *Savage v. Dent*, Stran. 1064. *Jones*, d. Griffiths, v. *Marsh*, 4 T. R. 464.

(i) Exceptions to this general rule are cre-

ated, in particular cases, by the provisions of the statutes 4 Geo. II. c. 28. 11 Geo. II. c. 19. *Vide ante*, 150. 161.

With this single exception, however, a claimant in ejectment may always proceed, in the superior courts, by the modern method.

The suit is commenced by the delivery of the declaration against the casual ejector, to the tenant in possession; [1] for, as the plaintiff and defendant in the action, are only fictitious persons, the suing out of a writ would be an useless form. This declaration is, in fact, in itself a kind of writ, or process; and is the only means by which the party in possession is informed of the claim set up by the lessor, and required to appear and defend his title. (j)

(j) A declaration in ejectment is so far considered a process of the court, that the court will punish as a contempt any improper conduct of the tenant at the time of its delivery. *Rez v. Unitt, Stran. 567.*

[1] "The service of a Declaration in Ejectment on the tenant in possession, is considered as much the commencement of the suit, as the service of a *Capias ad Respondendum* in personal Actions." (*Per VAN NESS, J. delivering the Opinion of the Court,*) *Baron vs. Abeel, 3 Johns Rep. 482.*

By the "*Revised Statutes*" of New-York, Part 3, Chap. 5, Tit. 1, § 5, (*Vol. 2, p. 304,*) The Action of Ejectment "shall be commenced by the service of a declaration, in which the names of the real claimants shall be inserted as plaintiffs, and all the provisions of law concerning lessors of a plaintiff, shall apply to such plaintiffs."

The service of a second declaration in Ejectment by the plaintiff's agent, though without his knowledge, is a waiver of the first. *Kemble vs. Finch, 1 Johns. Cas. 414.*

Serving the declaration and notice in Ejectment on the tenant, is sufficient to put him on inquiry, and a subsequent notice may be served by putting it up in the Clerk's Office. *Jackson ex dem. Hogeboom vs. Stiles, 1 Caines' Rep. 240.*

The tenant moved to set aside the rules to appear, &c. on the ground of a misdirection of the notice, which would appear by a reference to the proceedings on file; but the Court refused to grant the motion, as it was to be presumed, from their not producing the notice served, that the services were regular, especially, if by granting the motion, the Statute of Limitations would attach. *Jackson ex dem. Hogeboom vs. Stiles, 1 Caines' Rep. 501.*

The Orphan's Court directed an issue in Ejectment, in which A, B, was to be plaintiff, and C, D., and others, defendants, in which the question to be decided should be, whether the plaintiff was entitled to recover under the deed from J. M. to the plaintiff: An amicable action of Ejectment was entered in the Court of Common Pleas, in which the defendants pleaded the general issue, and there was a verdict and judgment for the plaintiff; but no declaration nor description of the land was filed. *Id. erroneous. Wallace & Al. vs. Elder, 5 Serg. & R. Rep. 143.*

An amicable action of Ejectment is good, although the act of 1806, [of Pennsylvania,] declares that all writs in Ejectment shall be in the form prescribed by that act, and not otherwise. *Massey vs. Thomas, 6 Binn. Rep. 333.*

The declaration, when the proceedings are in the King's Bench, may be framed to answer either to an action commenced *by bill* or *by original*, but the latter is the preferable and most common method; because the action is then considered by the Court, as though it actually had been commenced *by original*, and no writ of error can be brought thereon except in Parliament. In the Common Pleas, the declaration is, of course, always framed as if the proceedings were *by original*.<sup>(k)</sup>

[ \*185 ] \*The declaration should regularly be entitled of the term immediately preceding the vacation in which it is delivered; but if it be not entitled of any term, the omission will be immaterial, provided the tenant has sufficient notice given him therein to appear to the action. As where the declaration was delivered before the essoign day of Hilary term, and the notice at its foot was dated Jan. 1, 1818, and was to appear within the four first days of the next term.<sup>(l)</sup>

With respect also to the term of which the declaration against the casual ejector may be entitled, a striking dissimilarity from the practice in all other actions prevails. The demise stated in the declaration, is the title upon which the plaintiff is supposed to enter, and the ouster the supposed wrong for which the action is brought. The plaintiff has, consequently, no cause of action antecedently to the day of the ouster; and according to the general rules of pleading, could not entitle his declaration anterior to that time. But it is otherwise in an ejectment; for the defendant being a nominal person, cannot take advantage of the objection, and if the tenant appear, and apply to be admitted a defendant instead of the casual ejector, he will be compelled by the consent rule to accept a declaration entitled of a subsequent term.<sup>[1]</sup> Therefore, if the demise be laid in the vacation time, and the declaration against the casual ejector be entitled of the preceding term, it will be sufficient; because, if the party in possession defend the action, the declaration against him (as will be explained hereafter) will be entitled of the sub-

(k) Appendix, No. 12, 14, 15.

(l) *Goodtitle, d. Price, v. Badtitle*, H. T. 1818. K. B.—M. S.

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[1] The title to a Declaration in Ejectment is mere form, and good, though of a term after its service. *Jackson ex dem. Everest & Al. vs. Stiles*, 6 Cowen's Rep. 597.

So, though it be without any title at all. *Ibid.*

sequent term; and if he leave the suit undefended, judgment will be taken out against the casual ejector.(m)

\*The *venue* in ejectment is local, and confined to the county [ \*186 ] in which the lands are situated.(n)

The demise declared upon by the plaintiff, in the modern practice, is fictitious only; [1] but still it must be consistent with the title of his lessor; that is to say, such a demise must be supposed to be made, as would, if actually made, have transferred the right of possession to the lessee. [2]

(m) *Imp. K. B. 642. 11 Ill. Prac. Reg. 698. Threlfall v. Brand, 2 Vent. 174.*

(n) *Anon. 6 Mod. 232. Mostyn v. Fabrigas, Cowp. 161, 176.*

[1] *Vide ANTE, Page 14, n. [1.]*

[2] "Although the demise is a fiction, still the fiction must be such as might by possibility have been true: The lessor is supposed to have been capable of making a demise not only at the time when the demise is alleged to have been made, but when the Suit was brought." (Per SUTHERLAND, J. delivering the Opinion of the Court.) *Doe ex dem. Marston & Al. vs Butler, 3 Wend. Rep. 154.*

The plaintiff must set forth a lease which might by possibility be a good subsisting lease at the time of the supposed date or making of the lease, at the time of the ouster, and at the time of the bringing the action.—*Bates ex dem. Shattuck vs. Tucker, Chipman's Rep. 69.*

If the fiction of a lease potentially cease, or a fact arise which destroys the possibility of such lease, or destroys its effect, if supposed once to have existed, there can be no recovery. *Norton ex dem. Douglass vs. Spooner, Chipman's Rep. 74.*

The plaintiff cannot recover under a demise from a lessor who has released his interest to the defendant. *Jackson ex dem. Bonnel & Al. vs. Foster, 12 Johns. Rep. 488.*

If the plaintiff in Ejectment declare on a lease, and prove a title in fee, he cannot recover. *Douglass vs. Spooner, Chipman's Rep. 74.*

A demise in a declaration of Ejectment laid from a man who was dead at the commencement of the suit, may be objected to at the trial, and is cause of nonsuit. A lessor must be capable of making a demise, not only at the time alleged in the declaration, but also when the suit is commenced. *Doe ex dem. Marston vs. Butler, 3 Wend. Rep. 149.*

Where a joint demise is laid in the names of several lessors, it must be proved as laid; and unless it be shewn that the lessors had such an interest as would enable them to join in a demise, the plaintiff will be nonsuited. *Ibid.*

On a joint demise the title must be joint, or the plaintiffs cannot recover. *Taylor & Al. vs. Taylor & Al. 3 Marsh. Rep. (Ky.) 19.*

An Ejectment cannot be maintained on a joint demise by the husband and wife, when the title is in the husband alone. *Tucker & Uz. vs. Vance, 2 Marsh. Rep. (Ky.) 457.*

Thus, if there be several lessors, and a joint demise by them all be alleged, such a title must be shown at the trial, as would enable each of them to demise the whole; because, if any one of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them. As, where *A.* was tenant for life, and *B.* had the remainder in fee, and they made a lease to *C.*, and declared upon the lease as a *joint demise*, it was held bad; because, during *A.*'s life, it was the lease of *A.*, and the confirmation of *B.*, and after the death of *A.*, it was the lease of *B.*, and the confirmation of *A.*, but not a joint demise. (o)

Joint tenants, or parceners, have a sufficient interest in the lands held in joint tenancy, or parcenery, to entitle them to make a joint demise of the whole premises, but tenants in common have not: [3] and the rea-

(o) *King v. Bery*, Poph. 57. *Treport's case*, 6 Co. 15, (b).

In Ejectment where the plaintiff declares on *separate* demises by two, each for a moiety, and fails to prove title in one of the moieties, he may nevertheless recover, according to the title proved in the other lessor. *Allen, &c. vs. Trimble, &c.* 4 *Bibb's Rep.* 21.

After issue joined upon the title in Ejectment, no exception can be taken to the form of the declaration. *Rees vs. Middleton*, 1 *Mursh. Rep.* (Ky.) 6.

In Ejectment, the Court are bound to take notice of the real parties litigating. *Lessee of Campbell vs. Sproat*, 1 *Yeates's Rep.* 20.

[3] Tenants in common may recover on a joint demise. *Doe ex dem. Nizon's Heirs vs. Potts*, 1 *Hawk's, Rep.* 469.

Tenants in common may declare either on a joint demise, or on separate demises. *Jackson ex dem. Vandenberg & Al. vs. Bradt*, 2 *Caines' Rep.* 169.

Where the declaration in Ejectment states that the lessors *jointly* and *severally* demised, it is supported by proving a tenancy in common.—*Courtney, &c. vs. Shropshire*, 3 *Litt. Rep.* 265.

There is nothing impracticable in fact, nor absurd in law, in joint and several demises of the same land. *Ibid.*

In Vermont *tenants in common* may maintain a *joint* action of Ejectment. *Hicks & Al. vs. Rogers*, 4 *Cranch's, Rep.* 165.

A declaration in Ejectment by tenants in common, *quod demisserunt*, is bad. *Steinnetz & Al. vs. Nizon*, 3 *Yeates's Rep.* 285.

If the declaration in Ejectment, in the old form, by several plaintiffs, set forth a joint demise, and in making out their title it appears they are tenants in common, they cannot recover. *White & Al. vs. Lessee of Pickering & Al.* 12 *Serg. & R. Rep.* 435.

In Ejectment tenants in common cannot make a joint demise. *Innis vs. Crawford*, 4 *Bibb's Rep.* 241.

son for this difference seems to be, that tenants in common have several and distinct titles and estates, independent of each other, so as to render the freehold several also; whilst joint tenants \*and [ \*187 ] parceners are seised *per my et per tout*, derive by one and the same title, have a *joint possession*, and must join in any action for an injury thereto; so that each of them may properly be said to demise the whole.(p)

It is not, however, compulsory upon joint tenants, or parceners, to allege a joint demise; [1] for if a joint tenant or parcener, bring an ejectment without joining his companion in the demise, it is considered as a severance of the tenancy, and he will be allowed to recover his separate moiety of the land. And if all the joint tenants, or parceners, join in the action, but declare upon separate demises by each, it is held, that they may recover the whole premises; because, by the several demises, the plaintiff has the entire interest in the whole subject matter, although the joint tenancy is severed by the separate letting.(q)

When two, or more, tenants in common, are lessors of the plaintiff, a separate demise must be laid by each,(r)[2] or they must join in a lease

(p) *Moore v. Fursden*, 1 Show. 342. *Milner v. Robinson*, Moore, 682. *Boner v. Juner*, Ld. Raym. 726. *Mantle v. Wollington*, Cro. Jac 166. *Morris v. Barry*, 1 Wils. 1. *Heartherty, d. Worthington, v. Weston*, 2 Wils. 232.

(q) *Doe, d. Gill, v. Pearson*, 6 East, 173. *Roe, d. Raper, v. Lonsdale*, 12 East, 39. *Doe, d. Marsack, v. Read*, 12 East, 57. *Doe, d. Lulham, v. Fenn*, 3 Campb. 190. (r) App. No. 24, 15.

[1] One of several coparceners may bring Ejectment on her separate demise. *Jackson ex dem. Fitzroy & Uz. & Al. vs. Sample*, 1 Johns. Cas. 231.

Separate demises from several lessors, may be laid in the declaration in Ejectment; and the plaintiff, at the trial, may give in evidence the separate titles of the several lessors to separate parts of the premises in question, and recover accordingly. *Jackson ex dem. Roman & Al. vs. Sidney*, 12 Johns. Rep. 185.

Joint tenants must join in Ejectment, and one of three joint tenants cannot recover a third part of the premises of a stranger. *Milne vs. Cummings*, 4 Yeates's Rep. 577.

[2] *Vide ANTE*, Page 186, n. [2].

A declaration in Ejectment contained two counts, one on a demise by A, and the other on a demise by B. Held, that the plaintiff might recover on the count whereby the land was demised by B although he could not recover on the other count. *Bevans vs. Taylor & Al. Lessee*, 7 Harr. & Johns. Rep. 1.



to a third person, and state the demise to the plaintiff to have been made by their lessee. The first is the most usual mode of proceeding, and the declaration need not state the several demises to be of the [ \*188 ] \*several shares belonging to the several tenants respectively ; but each demise may be alleged generally to be of the whole premises demanded ; for under a demise of the whole an undivided moiety may be recovered.(r)[1]

(r) *Doe, d. Bryant, v. Wippel*, 1 Esp. 330.

[1] Vide "*Revised Statutes*," Part 3, Chap. 5, Tit. 1, § 9, Vol. 2, p. 300. (Cited *ANTZ*, Page 20, n. [1])

Although a plaintiff in Ejectment may recover less than he claims, yet it must consist of the same nature with that claimed. If he claim an undivided moiety, an undivided third, &c. may be recovered, but he cannot recover an undivided part, where he claims an entirety, and vice versa. *Carrol & Al. Lessee, vs. Norwood's Heirs*, 1 Harr. & Johns. Rep. 463. (*In Nota.*)

The plaintiff cannot declare for a whole tract of land and give evidence of a title to an undivided moiety. *Young vs. Drew*, 1 Taylor. 119. *Young vs. Harris*, *ibid.*

In Ejectment the plaintiff shall recover according to his right : if the whole be demanded the jury may find for a moiety, and it is good. *Doe ex dem. Chapin vs. Scott*, *Chipman's Rep.* 74.

In Ejectment for a moiety of a tract, a third may be recovered. *Squires vs. Riggs*, 2 Hayw. Rep. 150.

So, if the plaintiff sue for a ninth, he may recover an eighteenth. *Den. vs. Evans*, 2 Hayw. Rep. 222.

If the plaintiff in Ejectment declare for the whole, he may recover a part ; or if he declare for a part, he may recover less : The rule is, that he may recover less, though he may not recover more than he declares for. *Lessee of Patton & Al. vs. Cooper*, 1 Cooke's Rep. 333.

Under a demise in a Declaration in Ejectment of an entire tract of land, less than the whole may be recovered, but it must be an entire and not an undivided interest. *Benson's Lessee vs. Musseter*, 7 Harr. & Johns. Rep. 208.

If the plaintiff, in his declaration, claim the whole tract, a deed conveying any undivided interest is admissible in evidence. *Doe, Lessee of Lewis & Uz. vs. McFarland & Al.*, 9 Cranch's Rep. 151.

The plaintiff in Ejectment cannot recover a greater quantity or interest than he declares for, but he may recover less. *Davis's Lessee vs. Whitesides*, 1 Bibb's Rep. 510.

A plaintiff in Ejectment who declares for a sole interest, may recover an undivided moiety. *Gist's Heirs vs. Robinet*, 3 Bibb's Rep. 2.

Thus, if the demise be laid from two heirs, and it appear that there were three, yet the plaintiff shall recover an undivided interest of two thirds. *Ward's Heirs vs. Harrison, &c.*, 3 Bibb's Rep. 304. *Larue's Heirs vs. Slack & Al.*, 4 Bibb's Rep. 358.

When any doubt exists as to the party in whom the legal title is vested, it is usual to declare upon several distinct demises by the several persons concerned in interest,<sup>(s)</sup>[2] and the claimants will not then be confined at the trial to one particular demise, but will be allowed to resort to any included in the declaration, under which they may be able to prove a title to the premises. Difficulties of this nature frequently occur when trustees are lessors of the plaintiff; and it is always advisable to lay separate demises by the trustees, and *cestui que trust*, unless the effect of the statute of uses upon the trust is more clear and indisputable. But application should, in strictness, be first made to such trustees for permission to make use of their names; and where demises are inserted in the names of any parties without their consent, the court, on motion, will order such demises to be struck out of the declaration, unless the justice of the case should be defeated thereby. But where a plaintiff laid a demise by his assignees, without their permission, (they having given up

(s) Appendix, No. 14, 15.

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[2] In the case of *Jackson ex dem. Roman & Al. vs. Sidney*, (12 *Johns. Rep.* 185.) the COURT said, "The declaration contains separate demises from each lessor, and upon the trial it was offered, on the part of the plaintiff, to show a separate title in each lessor to a distinct part of the premises in question; and this was objected to and overruled by the Judge, and the plaintiff compelled to elect, and proceed upon one count only. Had the lessors been tenants in common of the premises, there could be no doubt but that they would have had a right to recover the whole, if they could have shown a title to the same. And there can be no good reason against their showing a separate title in each to a distinct part. It cannot subject the defendant to any inconvenience, or operate as a surprise upon him; and the costs to which he may be made liable, on a recovery against him, will be much less than if four separate actions were brought. It is a course, therefore, that ought to be encouraged, as it prevents multiplicity of suits. A new trial must, therefore, be awarded, with costs, to abide the event of the suit."

The "*Revised Statutes*," Part 3, Chap. 5, Tit. 1, § 10 & 11, (*Vol.* 2, pp. 304, 305,) contain the following provisions:

"§ 10. If the action be brought for the recovery of dower, the declaration shall state that the plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower as widow of her husband, naming him. In every other case, the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or the life of another, or for a term of years, specifying such lives or the duration of such term.

"§ 11. In any case other than where the action shall be brought for the recovery of dower, the declaration may contain several counts, and several parties may be named as plaintiffs, jointly, in one count, and separately, in others."

to him the property in the premises,) and obtained judgment  
 ] \*189 ] and execution thereupon, the court \*refused to set the proceedings aside at the instance of the defendant in the ejectment, notwithstanding an affidavit from one of the assignees, that he knew nothing of the premises in question.(1)

The day on which the demise is stated to have been made, is so far material that it must be subsequent to the time when the claimant's right of entry accrues; [1] for if the lessor have not a right to enter, he cannot have a right to demise the lands; and, consequently, the plaintiff must be non-suited at the trial; [2] for his lessor cannot be supposed to have

(1) *Doe, d. Vine, v. Figgins*, 3 Taunt 410.

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[1] Vide "*Revised Statutes*," Part 3, Chap. 5, Tit. 1, § 7, Vol. 2. p. 304. (Cited ANTE, Page 20.)

The demise in a declaration in Ejectment must be laid as of a day subsequent to that when the lessor's right of entry accrued. *Dickenson vs. Jackson ex dem. Caldwell*, 6 Cowen's Rep. 147.

In Ejectment by the mortgagee against the mortgagor or those claiming under him, the demise must be laid as of a day subsequent to a default in payment; and subsequent to a dissolution of the tenancy, by notice to quit, or otherwise. *Ibid.*

The time of the demise must be laid at, or subsequent to, the period when the lessor's right accrued. *Van Alen vs. Rogers*, 1 Johns. Cas. 283.

[2] A demise being laid in Ejectment, before the title of the lessor of the plaintiff accrued, cannot be taken advantage of after issue joined. *Whittington & Al. vs. Christian & Al.*, 2 Rand. Rep. 353.

If in Ejectment, the demise and ouster be laid precedent to the plaintiff's title, it is cured by the Act of Jeofails. *Duvall & Al. vs. Bibb*, 3 Call's Rep. 362.

A copy of a declaration in Ejectment having been delivered to the sheriff to be served, it was discovered that the lessor had died before the date of the lease. Before the return day, another declaration, stating a lease, before the lessors death, was delivered and filed. A motion to quash the proceedings was refused. *Lessee of Ferguson vs. Smallman*, Addis. Rep. 13.

In an action of Ejectment the demise in the declaration was stated to be on the first of *January*, 1801, and the conveyance offered in evidence, under which the plaintiff claimed, was dated on the 23d *February*, 1802; *Held*, that an Ejectment is an action to try the right of possession to the land in controversy. The lease, entry and ouster laid in the declaration are fictitious, and substituted in the place of a real lease, actual entry and ouster. The time of the demise is matter of substance, and not form, and the plaintiff must show a title in his lessors, anterior to the time of the demise, because without such title they could not make a real lease.—*Wood vs Grundy & Al. Lessec*, 3 Harr. & Johns. Rep. 13.

made an illegal demise.(u) It is usual, however, to lay the demise as far back as the lessor's title will admit; because the judgment in ejectment is conclusive evidence as to the title of the lessor, for all the mesne profits accruing subsequently to the day of the demise;(v) and when \*there are any doubts as to the period when the lessor's [ \*190 ] title accrued, it is customary to state different demises by him on different days.

In an ejectment on the demise of an heir by descent, the demise was laid on the day the ancestor died, and held to be well enough; for the ancestor might die at five o'clock, the heir enter at six, and make a lease at seven, which would be a good lease.(w) It seems, also, according to Lord *Hardwicke*, that a posthumous son, taking lands under the provisions of 10 and 11 Wm. III. c. 16. would be entitled to lay the demise in an ejectment, from the day of his father's death.(x)

It has already been observed, that in an ejectment, by the surrenderee, of copyhold premises, the demise may be laid against all persons but the lord, on a day between the times of surrender and admittance, provided the surrenderee be admitted before tria

l.(y)

But this doctrine of relation does not apply where the assignees of a bankrupt are the lessors of the plaintiff, so as to enable them to recover the freehold lands of the bankrupt, upon a demise subsequently to the act of bankruptcy, but before the date of the bargain and sale by the commissioners; for the freehold remains in the bankrupt, though not beneficially, until taken out of him by the conveyance.(z)

In like manner, a conveyance to a creditor of an insolvent debtor's estate by the clerk of the peace, (in whom it \*is ves- [ \*191 ] ted, upon the order for the insolvent's discharge, by the stat. 41 G. III. c. 70. s. 15. until the subsequent conveyance to the creditor,) does not vest such estate in the creditor, by relation, either to the date of the order or of the conveyance, but only from the actual execution of such conveyance by the clerk of the peace; and, therefore such creditor cannot recover in ejectment, upon a demise laid anterior to the execution of the deed, although subsequent to the time

(u) *Ante*, 19. *Goodtitle, d. Galloway, v. Herbert*, 4 T. R. 680.

(v) *Aislin v. Parkin*, Barr. 685.

(w) *Roe, d. Wrangham, v. Hersey*, 3 Wils. 274.

(x) B. N. P. 105.

(y) *Ante*, 68.

(z) *Doe, d. Esdaile, v. Mitchell*, 2 M. & S. 445.

when the estate was out of the insolvent debtor, and the order made to convey the same to the lessor.(a)

When a pauper has been let into possession of premises by the overseers of a parish, the demise should be laid by the overseers for the time being when the ejectment is brought, if the pauper has done any act recognizing a holding under them; but otherwise by the overseers who let him into possession, or the last set of overseers whom he has acknowledged as his landlord.(b)

When a fine with proclamations has been levied, and an actual entry is necessary to avoid it, the demise must be laid on a day subsequent to the entry.(c)

Tenancies at will scarcely exist at the present day; but when an ejectment is brought against a tenant at will, the demise must be laid subsequently to the time when possession is demanded, that is to say, subsequently to the determination of the will.(d)

[ \*192 ] \*When an ejectment is intended to be brought against a tenant from year to year, and the time of the commencement of the tenancy is unknown, the only sure method of avoiding a nonsuit is to give a general notice to quit "at the end and expiration of the current year of the tenancy thereof, which shall expire next after the end of one half year from the date of the notice," and to lay the demise eighteen months after the delivery of such notice.(e)

The length of the term, during which the premises are alleged in the declaration to have been demised to the plaintiff, is wholly unconnected with the title of the claimant, and may be of longer duration than his interest in the land.(f) A contrary doctrine was once, indeed, maintained, upon the principle, that by a judgment in ejectment the plaintiff recovers his term mentioned in the declaration, and, therefore, if the term declared on, be of greater duration than the lessor's title, as, for instance, if the lessor be entitled to the lands for three years only, and the plaintiff declare on a demise for five, he would wrongfully hold the lands for the last two years.(g) But this doctrine has since been very cor-

(a) *Doe, d. Whatley, v. Telling*, 2 East, 256.

(b) *Doe, d. Grundy, v. Clarke*, 14 East, 433.

(c) *Berrington, d. Dormer, v. Parkhurst*, And. 125. S. C. Stran. 1086. S. C. Willes, 327. S. C. 13 East, 436.

(d) *Ante*, 108.

(e) *Vide post*, chap. 10.

(f) *Doe, d. Shore, v. Porter*, 3 T. R. 13.

(g) *Roe v. Williamson*, 2 Lev. 140. S. C. 3 Keb. 490.

rectly overruled : because if the lessor have the right of possession but for a month, and make a lease for seven years, it will enure to his lessee for the month duly, and during that time he will be entitled to the possession : and, as a judgment in ejectment is not admitted as evidence of the lessor's title, he cannot by reason of it be enabled to keep possession after the month has expired.(h)

\*Seven years is the term usually declared upon ; and the [ \*193 ] only direction necessary to be given upon this point is, that the term be of a length sufficient to admit of the lessor's recovering possession of the land before its expiration ; although the courts are now very liberal in permitting lessors to amend in this respect, as will be stated hereafter.

It was for some time, even after the introduction of the modern practice, holden necessary, that when an ejectment was brought by a corporation aggregate, they should execute a power of attorney, authorizing some person to enter and make a lease on the lands ; that such person accordingly should enter, and make a lease under seal ; and that the declaration should state the demise to be by deed.(i) These forms, it seems, were deemed necessary upon the principle, that a corporation aggregate cannot perform any corporate act otherwise than under the corporation seal, nor make an attorney, or bailiff, but by deed. They could not, it was therefore said, enter and demise upon the land in person, as natural persons could ; nor substitute an attorney to enter into a rule for their costs : nor would an attachment go against them for disobedience to that rule. They therefore made an actual lease upon the lands, and then the attorney proceeded in the common method. But, since the principles of this action have been more clearly understood, none of these peculiarities are necessary ; and the demise may now be laid in the general way, without any power of attorney being made, any lease being assigned,(j) or any statement of such a lease being introduced into the declaration. One case only is indeed to be found upon the latter point, and in that, the question arose after \*the ver- [ \*194 ] dict ;(j) but from the reasoning then used by the court, no doubt

(h) B. N. P. 106. *Clerke v. Rowell*, 1 Mod. 10.

(i) Gilb. Eject. 35.

(j) *Furley, d. Mayor of Canterbury, v. Wood*, 1 Esp. 198.

(j) *Partridge v. Ball, Ltd.* Raym. 186. 6; C. Carth. 390.

can be entertained that the principle would be extended to every stage of the action : and that a plaintiff in ejectment would never be nonsuited for the omission of such a statement.(k) The demise is still certainly sometimes stated to be by deed ; and it is immaterial whether it be so or not, as, notwithstanding the statement, no proof of the deed is required.(l)

If a corporation be aggregate of many, they may set forth the demise in the declaration, without mentioning the Christian names of those who constitute the corporation ; but if the corporation be sole, as if the demise be by a bishop, the name of baptism must be inserted. The reason of this is, that in the first case the name solely consists of its character, but in the last, in its person ; therefore, there cannot be a sufficient specification of that person without mentioning his name.(m)

In the case of *Swadling v. Piers*,(n) it was ruled, that in an ejectment for tithes, the plaintiff must declare on a demise by deed, because tithes cannot pass but by deed ; but this decision has since been overruled, and the statement of a deed seems even in this case to be no longer necessary.(o)

[ \*195 ] \*It seems also to have been holden, that on a demise by the master and fellows of a college, dean and chapter of a cathedral, master or guardian of an hospital, parson, vicar, or other ecclesiastical person, of any lands, &c. the declaration should state that there was a rent reserved, &c. pursuant to the statute 13 Eliz. c. 10. ; but this form cannot now be necessary.(p)

A similar doctrine was once applied to the case of an infant ;(q) but it has been long settled, that an infant may make a lease without rent to try his title.(r) When, however, a demise is laid by an infant, his father, or guardian, should be made plaintiff, instead of a nominal person, in

(k) In the case of *Doe, d. Dean and Chapter of Rochester, v. Pierce*, the demise was in the common form, and many objections were taken upon other points by the defendants counsel, and overruled ; but they never adverted to the circumstance of the demise not being stated to be by deed. (Kent. Sum. Ass. 1808, M. S.)

(l) *Furley, d. Mayor of Canterbury, v. Wood*, 1 Esp. 198.

(m) *Carter v. Cromwell*, Sav. 128, cited, *Dyer*, 86.

(n) Cro. Jac. 613.

(o) *Partridge v. Ball*, Ld. Raym. 136. S. C. Carth. 380.

(p) *Carter v. Cromwell*, Sav. 129.

(q) Lill. Prac. Reg. 673.

(r) *Zouch v. Parsons*, Barr. 1794, 1806.

order to save the trouble and expense of giving security for the costs, which he would otherwise be compelled to do.(s)

It is not necessary to state, in the declaration, that the premises are situated in a parish, hamlet, &c. ; it is sufficient to mention the name of the place in which they are situate, without also describing it by the name of its ecclesiastical or civil division.(t)[1] And in one case, where even the name of the place was omitted when describing the premises, but such name could be collected from other parts of the declaration, the Court held the description to be sufficiently certain.(u)

When, however, the premises are described as lying in a [ \*196 ] parish, hamlet, &c. such a description must be a correct one, and an uncertain or improper description will be fatal. Thus, in an ejectment for lands, "in the parishes of *A.* and *B.*, or one of them," the judgment was arrested for the uncertainty, although it appeared that the parishes had originally been one, and lately been divided by an act of parliament, and that the boundaries were not settled.(v) But if the

(s) *Noks v. Windham*, Stran. 694. Anon. 1 Wils. 120.

(t) *Goodtitle, d. Benridge, v. Walter*, 4 Taunt. 671.

(u) *Goodright, d. Smallwood, v. Strother*, Black 706. The declaration in this case stated, that one M. S. "at *Haswell* in the county of *B.*" demised to plaintiff two messuages, from which messuages defendant at

*Haswell* aforesaid, ousted plaintiff; and the Court considered, that the statement of the ouster being at *Haswell*, amounted to a sufficient certainty, that the lands demised lay at *Haswell*.

(v) *Goodright, v. Fawson*, 7 Mod. 457. S C Barn. 184. *Cottingham, v. King*, Barr. 624, and the authorities there cited.

[1] Vide "*Revised Statutes*," Part 3, Chap 5, Tit. 1, § 8, Vol. 2, p. 304. (Cited ANTE Page 20, n. [1.])

A writ of Ejectment which mentions the township and county, the number of acres, and the names of the owners of adjoining lands, is a sufficient description of the land within the act of the 21st of March, 1806, [4 Sm. Laws, 332, *Pennsylvania*.] *Hawn vs. Norris & Al.* 4 Binn. Rep. 77.

A description naming the county and township, the quantity of acres, and the adjoining lands by which the tract is bounded, is sufficient. *Lyons vs. Miller*, 4 Serg. & R. Rep. 279.

Where a statement described lands as "a certain piece or parcel of land situate below and adjoining *A.* township, *B.* county, containing forty acres, be the same more or less, being part of a tract of land surveyed in the name of *C. D.*, and bounded by land surveyed in the name of *E. F.*," this was held to be a sufficient description. *Thomas vs. Culp*, 4 Serg. & R. Rep. 271.

In Ejectment, a description of the land claimed as two houses, one barn, eighty acres of arable land, twenty of woodland, with the appurtenances, in *Penn* township, *Northumberland* county, being part of a tract of land surveyed in pursuance of a warrant granted to *W. G.*, is sufficient after verdict. *Fisher & Al. vs. Larick & Al.* 7 Serg. & R. Rep. 99.



words "on one of them" had been omitted, it seems the description would have been sufficient, though all the lands were contained in one of the parishes.(w)

Where the premises were described as situate "*in the united parishes of St. Giles in the Fields, and St. George Bloomsbury,*" and it appeared that those two parishes were united together by Act of Parliament, for the maintaining of their poor, but for no other purpose, the variance was held fatal; for by the description, the parishes were stated as if they were completely blended together, and formed only one parish, when, in truth, they remained entirely distinct, except as to the main-  
[ \*197 ] tenance of the poor.(x) But \*where the premises were described as situate *in the parish of West Putworth and Bradworthy*, and it appeared that *West Putworth* and *Bradworthy* were separate parishes, the Court held the description to be sufficiently certain, rejecting the word *parish* as surplusage, and considering the demise as of lands in *West Putworth* and *Bradworthy*.(y) And where the premises were laid to be at the parish of *Farnham*, and were proved at the trial to be in the parish of *Farnham Royal*, it was held not to be a fatal variance, unless it could be proved that there were two *Farnhams*.(z)

When the premises lie in different parishes, it has been usual to enumerate the whole as lying in one parish, and to repeat the description of them as lying in the other parish; but it seems sufficient to enumerate them once only, describing them as lying in the parishes of *A.* and *B.*, or in *A.* and *B.* respectively.(a)

The number of messuages, acres, &c. mentioned in the demise, need not correspond with the number to which the lessor claims title. He

(w) *Goodwin v. Blackman*, 3 Lev. 334. In this case the ejectment was "for a tenth part of a messuage in *D.* and *F.*" and the whole messuage appearing in evidence to lie in *D.*, and no part in *F.*, the description was held ill, because it was, "precisely of the tenth part of an entire thing;" though it was said by the court, that if the ejectment had been of an acre of land in *D.* and *F.*, and it appeared that the whole acre was in *D.*, it would be well enough. The reason for this diversity seems to be, that the acre being the whole thing demanded, the description is sufficient-

ly certain, although it all be in one parish; whereas when only a tenth part is demanded, it is uncertain which tenth part is meant, and, therefore, as no tenth part answers the description, the sheriff could not give execution; *tamen quare et vide Barr. 330. et ante, 20.*

(x) *Goodtitle, v. Pinsent, d. Lammiman*, 2 Campb 274. S. C. 6 Esp. 123.

(y) *Goodtitle d. Brembridge, v. Walter*, 4 Taunt. 671.

(z) *Doe, d. Tillet, v. Salter*, 13 East, 9.

(a) 2 Chitty, Prec. 395.

may declare for an indefinite number, [1] as a hundred messuages, a thousand acres of arable land, &c. ; and care should be taken that the number specified in the demise be larger than the number claimed ; because, although if he declare for more than he is entitled to, he may recover less, the reverse will not hold (b)[2] Upon the same principle, if the lessor of the plaintiff be entitled to a moiety, or other part, of an entire thing, as the half, \*or third part, of a house, he may re- [\*198] cover such moiety, or third part, on a demand for the whole.(c)[1]

The entry of the plaintiff on the land need not be alleged in the declaration, to be made on any particular day, although in the precedents it is usually so stated. It is sufficient if it be declared generally, that the plaintiff entered by virtue of the demise : nor does it seem to have been required, even in the ancient practice, to be more explicit, because, as the plaintiff entered *by virtue* of the lease, he must necessarily have entered after his title accrued ; though it was then said, that it might have been otherwise, if the declaration had been *prætextu cujus* he entered, for the plaintiff might enter unlawfully, or before his time, under pretence of the lease.(d)

The day upon which the ouster of the plaintiff, by the casual ejector, is alleged to have taken place, should regularly be after the commencement of the supposed lease and entry. This is requisite, in order to support the consistency of the fiction ; because, as the title of the plaintiff

(b) *Denn, d. Burgis, v. Purvis*, Barr. 326.  
*Guy v. Rand*, Cro. Eliz. 13.

(c) *Ablett v. Skinner*, 1 Siderf. 229. *Goodwin v. Blackman*, 3 Lev. 334. In an ancient case it is said, that if an ejectment be brought for an acre of land, and the metes and bounds be described in the declaration, and the jury find the defendant guilty in half an acre of

land, the verdict will be bad ; because of the uncertainty of which part, or moiety, the plaintiff is to have execution. (*Winkworth v. Mann*, Yelv. 114, *tamen quare, et vide ante*, chap. 2 )

(d) *Wakely. v. Warren*, 2 Roll. Rep. 466  
*Sed vide Douglas v. Shank*, Cro. Eliz. 763.

[1] A plaintiff in Ejectment claiming under a deed conveying “ *the balance of a tract of land* ” must show *what the balance is*, and *where situate*, or he cannot recover. *Taylor & Al. vs. Taylor & Al.* 3 Marsh. Rep. (Ky.) 19.

[2] If the plaintiff in Ejectment declare for the whole, he may recover a part ; or if he declare for a part, he may recover less : the rule is, that he may recover less, though he cannot recover more than he declares for. *Lessee of Patton & Al. vs. Cooper*, 1 Cooke's Rep. 133.

A plaintiff in Ejectment may recover part of the land for which the suit was brought. *Santee vs. Keister*, 6 Binn. Rep. 36.

[1] *Vide ANTE* Page 20, n. [1], & Page 183, n. [1].

is supposed to arise from the lease mentioned in the declaration, it would be absurd for him to complain of an injury to his possession before, by his own showing, he had any claim to be possessed. But it does not seem absolutely necessary that this consistency should be preserved ;

for, as the words "*afterwards, to wit.*"[2] are always used immediately before mentioning the day of the ouster, it is most probable, upon the principles by which ejectments are at present regulated, that the courts would in all cases consider an ouster laid previously to the day of the entry, "as impossible and repugnant," and as such reject it.(e) Even when the old practice prevailed, and the true principles of the remedy were so little understood, every possible intendment was made in favour of the plaintiff, when an ouster was alleged anterior to the time of the demise. Thus, on a demise from the first of February, 1752, to hold from the 8th of January before, and that afterwards, namely, on the 28th of January, 1752, defendant ejected him, and it was insisted for the defendants, that the plaintiff's title did not commence until the 1st of February, and, therefore, that the ouster was laid too soon ; the court held, that the day of the ouster, being laid under a *scilicet*, was surplusage, and that "*afterwards*" should relate to the time of making the lease, and then all would be well enough.(f) In like manner, on a demise from the 6th of May, *anno septimo*, by virtue of which plaintiff entered, and was possessed until afterwards, on the 18th of the *same* month, *anno sexto supradicto*, defendant ejected him, the court held the declaration sufficient ; because the ouster was laid to be on the 18th of the *same* month, which it could not be if it were done in the sixth year, and rejected the word *sexto* as inconsistent and void.(g) Upon the same principle, where the demise was on the *sixth* of September, 2 Jac., by virtue of which the plaintiff held, until afterwards, (to wit) on the *fourth* day of September, 2 Jac., defendant ejected him, the declaration

(e) *Adams v. Goose*, Cro. Jac. 96. B. N. P. 106.

(f) B. N. P. 106.

(g) *Davis v. Purdy*, Yelv. 182.

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[2] Where a declaration in Ejectment stated a lease on a certain day, to hold *from* the same day, and that the defendant *on the same day*, afterwards ejected the lessee, it was *ruled* that the latter words might be considered as surplusage. *Lessee of Lynn & Al. vs. Downes*, 1 Yeates' Rep. 518.

was holden good, and the words under the *scilicet* rejected as surplusage.(h)

\*From the case of *Merrell v. Smith*,(i) it does not seem necessary to allege any particular day for the ouster, provided it appears from the declaration to be subsequent to the commencement of the term, and prior to the bringing of the action ; but in the precedents a day certain is always laid, and it is the better method to mention a particular day.

With respect to the ouster in an ejectment for tithes, it is said, in the case of *Worrall v. Harper*,(j) that where the ouster was set forth to have been made in the month of May, it was held ill, because there was no tithes to be ousted of at that season of the year ; but this doctrine is controverted by *Gilbert*, C. B., on the principle, that the law does not judicially take notice of the time when the tithes arise.(k)

#### OF AMENDING THE DECLARATION.[1]

It was formerly the practice, both in the King's Bench and the Common Pleas, not to permit the declaration in ejectment to be amended, until the landlord, or tenant, had been made defendant instead of the casual ejector ;[2] \*and, consequently, if the defects were such as to prevent the courts from granting the

(h) *Adams v. Goose*, Cro. 96. Some old ejectment cases are to be found in the books. (*Goodgain v. Wakefield*, 1 Sid. 7. *Evans v. Croker*, 8 Mod. 198. *Stephens v. Croker*, Comb. 88. *Higham v. Cooke*, 4 Leon. 144. *Osborn v. Rider*, Cro Jac 185. *Llewelyn v. Williams*, Cro. Jac. 258. *Clayton's case* 5 Co. L.) in which the ousters were laid on the same days as the demises, and which were decided upon the distinctions formerly taken, as to the time of the commencement of a demise, when stated in the lease to be "from

the date," and when from "the day of the date" of the lease; but, since the judgment in *Pugh v. Duke of Leeds* (Cowp. 714.) by which it has been determined, that these expressions shall be construed indifferently, either *inclusively*, or *exclusively*, so as to give effect to the deed, these cases can no longer be authorities.

(i) Cro. Jac. 811. Jenk. 341.

(j) 1 Roll. Rep. 65.

(k) *Gilb. Eject.* 67.

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[1] A plaintiff in Ejectment ought not to be permitted to amend his declaration by the addition of a count stating a demise after the commencement of the suit. *Cox vs. Lacy*, 3 *Litt. Rep.* 334.

But if such amendment were not opposed by the defendant, and it do not appear that he has sustained any injury in consequence of it, the judgment will not be reversed in the Court of Appeals. *Ibid.*

[2] Omissions in the declaration in Ejectment against the casual eject-

common rule for judgment against the casual ejector, the plaintiff's lessor was compelled to discontinue the action, and resort to a new ejectment.<sup>(l)</sup> But this practice is inconsistent with the present mode of regulating the remedy; and the court would, it is presumed, now permit the lessor to amend his declaration before appearance, provided such amendment did no injustice to the tenant. Indeed, in a recent case, where, by mistake, the name of the tenant in possession was inserted at the commencement of the declaration, instead of that of the casual ejector, (the declaration and notice to appear being in other respects regular,) the court granted the rule for judgment upon the common affidavit of service, and *suggested*, that if the tenant did not appear to the action, an application should be made to amend the declaration.<sup>(m)</sup>[1]

It is also said that, even after appearance, the declaration can be amended in *form* only, and not in *matter of substance*; but it is now difficult to point out what errors would be deemed substance, and not amendable. Under the strict rules, by which the action was formerly conducted, the demise, the length of the term, the time of the [ \*202 ] ouster, &c.<sup>(n)</sup> were all considered as matters of substance;<sup>(o)</sup> and so unbending were the courts upon these points, that if the term expired, pending the action, by injunction from the Court of Chancery at the defendant's application, or by the delay of the court, in which

(l) *Roe, d. Stephenson, v. Doe*, Barn. 186.

(m) *Doe, d. Cobbey, v. Roe*, K. B. T. T. 1816. MS.

(n) Formerly when a person declared in ejectment in the Common Pleas, it was the course of the court, that after imparlance he should make a second declaration; and, when this practice prevailed, if the plaintiff, by his first declaration, had laid the ouster before

the commencement of his term, or omitted any other matter of substance, though the second declaration were correct, he could not recover; because the declaration on the imparlance roll was the material one on which the action was grounded.—(*Merrell v. Smith*, Cro. Jac. 311.—Jenk. 341.)

(o) *Doe, d. Hardman, v. Pilkington*, Burr 2447, and the cases there cited.

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or, may be cured in the declaration against the real defendant. *Heidekopper vs. Burrows*, Cir. Ct. April, 1805. MS. Rep. (Cited in Wharton's Digest, p. 183.)

[1] A declaration in Ejectment may be amended as in other actions. *Den ex dem. Denny vs. Smith*, 2 Penn. Rep. 710.

A motion to file a new declaration in Ejectment, the original being lost out of the office, and the defendant served with a notice to produce a copy, was refused. *Den ex dem. Cleveland vs. Grime*, 1 Murphy's Rep. 268.

the action was brought, in giving judgment, the lessor was obliged to resort to a new ejectment.(p)

\*A more liberal principle has, however, of late years been [ \*203 ] adopted ; and the demise,[1] term, &c. are now most correctly

(p) *Anon. Salk. 257 S. C. 6 Mod. 130. ton, Barn 17 Kenworth v. Thomas, And. 208, Scrape v. Rhodes, Barn. 8. Driver v Strat. Thrustout v. Gray, Cas. Temp. Hard. 165.*

[1] In Ejectment, it is generally allowed, of course, to amend by inserting a new demise, where the proposed lessor has a subsisting title. *Jackson ex dem. Harris & Al. vs. Murry & Al. 1 Cowen's Rep. 156.*

Otherwise where the Statute of Limitations has attached. *Ibid.*

And where the action was for a military lot, the defendants being *bona fide* possessors, and the effect would have been to defeat the operation of the statutes passed April 5th, 1803, (*Sess. 26, ch. 88, 3 Webster, 399.*) and afterwards in 1813, (*Sess. 36, ch. 80, s. 4, 1 R. L. 304.*) for their protection, the amendment was refused, *Ibid.*

For such an amendment would be equivalent to a new action, with a rule that it should overreach the Statute. *Ibid.*

The court will allow the plaintiff in Ejectment to amend his declaration, by changing the time of the demise. at any time before verdict, on such terms as will impose no hardships on the defendant. *Wood vs. Grundy & Al. Lessee, 3 Harr. & Johns. Rep. 13.*

In Ejectment the court will permit the plaintiff before trial to amend his declaration, so as to make the demise subsequent to the date of his title. *Rogers vs. Barnett, 4 Bibb's Rep. 480.*

A plaintiff in Ejectment has no right to amend his declaration by adding a count containing a demise from another person, and for a tract of land not before claimed. *Thomas vs. Head, 1 Marsh. Rep. (Ky.) 450.*

Where the declaration in Ejectment laid the demise on the *first day of February*, 1801, and possession under it " afterwards, to wit, on the *first of January last aforesaid* ;" it was held, that these last words might be rejected, so that the possession would appear to be after the demise. *Brown vs. Lutterloh, Cam. & Norw. Rep. 425.*

Amendment of the declaration by enlarging the demise in Ejectment was granted. *Den ex dem. Young vs. Erwin, 1 Hayw. Rep. 323.*

And the plaintiff shall not be nonsuited, although the demise has expired at the time of trial. *Den ex dem. Faircloth vs Ingraham & Al. 1 Hayw. Rep. 501.*

In Ejectment a declaration may be amended after issue joined, by introducing a new claim, but such introduction has no relation back to the service of notice ; but the suit, as to the new claim, originates with filing the amendment. *Taylor & Al. vs. Taylor & Al. 3 Marsh. Rep. (Ky.) 19.*

A plaintiff in Ejectment cannot be permitted to amend his declaration by adding a count laying a demise after the commencement of the suit, but if such amendment were not opposed by the defendant, and it do not appear

considered as formal only, and may be amended if necessary. Thus, in

that he has sustained any injury in consequence of it, the judgment will not be reversed in the Court of Appeals. *Cox vs. Lacy*, 3 *Litt. Rep.* 334.

It is doubtful, whether a court, under any circumstances, would be justifiable in permitting, by way of amendment, a new count to be added to a declaration in Ejectment laying a demise from a different person. *Renwick vs. Calwell*, 3 *Litt. Rep.* 237.

Several demises added in Ejectment on payment of costs, it appearing that the lessors sought to be added, had a subsisting legal title. *Jackson ex dem. Palmer & Al. vs. Travis*, 3 *Cowen's Rep.* 356.

Leave to amend a declaration in Ejectment by adding a new demise, will not be given on a mere notice of motion, without any cause shewn by affidavit. *Jackson ex dem. Abby vs. Smith*, 6 *Cowen's Rep.* 39.

CONTRA. *Anonymous case*, 2 *Caines' Rep.* 261. *Wimple & Al. vs. M'Dougal*, *Cole. Cas.* 49, 55. *Jackson ex dem. Quackenboss vs. Dennis*, 2 *Caines' Rep.* 177.

A new demise may be added, on terms, viz.; that the defendant have twenty days after service of amended declaration, to elect whether he would continue to defend; should he elect to defend, then he is to have the costs usual in cases of amendment, and twenty days from the time of making such election, to plead *de novo*, or abide by his former plea. If he elect to proceed no further, then to receive all his costs up to the day of making such election. *Anonymous*, 2 *Caines' Rep.* 265. *SAME POINT Anonymous*, 2 *Caines' Rep.* 261. *Et vide Wimple & Al. vs. M'Dougal*, *Cole. Cas.* 49.

After six years service of the declaration in Ejectment leave was given to amend, by adding new demises, on the plaintiff's paying all the costs already incurred, in case the defendant should choose to relinquish his defence. *Jackson ex dem. Finch vs. Kough*, 1 *Caines' Rep.* 251.

The plaintiff will not be permitted to amend his declaration, by inserting a demise from a person who has no claim, or any subsisting title to the premises in question. *Jackson ex dem. Starr vs. Richmond*, 4 *Johns. Rep.* 483.

The defendant may, at any time, move to have the demise of a lessor, who died before the commencement of the action, struck out of the declaration, without costs. *Jackson ex dem. Low vs. Reynolds*, 1 *Caines' Rep.* 20. *Jackson ex dem. Butler vs. Ditz*, 1 *Johns. Cas.* 392. *SAME CASE*, *Cole. Cas.* 102. *Jackson ex dem. Aikens & Al. vs. Bankraft*, 3 *Johns. Rep.* 259.

Where, on application of the defendant in Ejectment, a demise is ordered to be struck out of the declaration, he must serve a copy of the rule for the amendment on the plaintiff, which shall be deemed an actual amendment as to all subsequent proceedings on the part of the plaintiff; and the defendant, without a new copy of the declaration being served on him, must enter into the consent rule, and plead twenty days after service of the certified copy of the rule for the amendment, unless otherwise ordered by the court; and the rule shall be sufficient to authorise an actual amendment of the declaration on file, or to file a new one in its stead, whenever

an ejectment to recover lands, forfeited by the levying of a fine, where the demise was laid anterior to the time of the entry to avoid the fine, and the suit was staid, by injunction in the Court of Chancery,[2] for more than five years after the fine was levied, so that the lessor was not in time to make a second entry, or bring a second ejectment, the court permitted him to change the day of the demise, to a day subsequent to the day of the entry: Lord *Mansfield* observing, that the demise was a matter of form, and did not exist.(q) And in a recent case, where the ejectment was

(q) *Doe, d. Hardman, v. Pilkington, Barr. 247.*

it may become necessary. *Jackson ex dem. Kelly & Al. vs. Belknap, 7 Johns. Rep. 300.*

A lessor may be struck out of the declaration, on affidavit of his having no interest in the premises. *Jackson ex dem. Livingston & Al. vs. Sclover, 10 Johns. Rep. 368.*

The general rule is, that a lessor in Ejectment ought to have a subsisting title or interest in the premises; but, under special circumstances the Court will permit his demise to be retained. *Ibid.*

A declaration in Ejectment may be amended by altering the date of the demise. *Anonymous, 3 Halsted's Rep. 366.*

Where there was no period stated in the declaration for the commencement of the term, and no date to the demise, the declaration was held bad, although after verdict for the plaintiff. The Court said, "There is no title whatever stated in the plaintiff's declaration, no ground whereon the Court can presume an entry after the lease, and an ouster after the entry, or an unexpired term at the commencement of the lease. Therefore the judgment is arrested." *Nokes ex dem. Hogg vs. Shaw, Cam. & Norw. Rep. 457, 463.*

[2] Where a judgment in Ejectment rendered in the late General Court [Maryland] in 1802, had been stayed by injunction, and the case brought to and affirmed in the Court of Appeals, on appeal from Chancery, the term of the demise laid in the declaration was enlarged. *Turner & Al. vs. Worthington, 5 Harr. & Johns. Rep. 437. (In Nota.)*

A motion to enlarge the term of the demise in an action of Ejectment, wherein judgment had been rendered in the late General Court [Maryland] in 1790, refused at June term, 1822, of the Court of Appeals. *Frazier & Al. Lessee vs. Hall, 5 Harr. & Johns. Rep. 437.*

A party having been prevented from suing out execution in an Ejectment by an injunction in Chancery, which continued in force for many years, during which the term in the declaration in Ejectment expired the Court would not permit it to be enlarged, unless it were quite clear that the amendment would work no injustice to the opposite party. *Bradney & Al. vs. Hasseldon ex dem. Harper & Al. 1 Barnew. & Cress. Rep. 121.*

In Ejectment the demise cannot be enlarged after judgment and expiration of the demise, although the proceedings were stayed by injunction. *Owings vs. Marshall, 3 Bibb's Rep. 27.*



brought upon a forfeiture, and the demise was laid on a day anterior to the time when the forfeiture was committed, the court permitted the lessor of the plaintiff to amend (upon payment of the costs of the application,) after the record was made up, and the cause set down for trial.(r)[3] But this permission is not to be extended to the injury of the defendant, and therefore the court will not suffer the day of the de-

(r) *Doe, d. Rumford, v. Miller*, K. B. H. T. 1814. MS.—This case seems to carry the principle of allowing an amendment of the demise in an ejectment to its utmost limit. The ejectment was brought upon a covenant to finish certain buildings in a workmanlike manner before the 29th of Sept 1813. The demise was laid on the 26th day of March, 1813, and the declaration delivered on the 29th of Oct. 1813. The tenant appeared in the regular course, and the issue was made up, and

the cause set down for trial, at the first Sittings in Middlesex, in Hilary Term, 1814; but being entered late in the paper, stood over until the second Sittings. Two days before the second Sittings, a rule to show cause why the day of the demise should not be altered to the 30th of Sept. was obtained by the plaintiff, which rule was made absolute immediately before the rising of the court on the morning of the second Sittings.

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[3] Declaration in Ejectment amended by altering the time of the demise, which was laid before the title accrued, upon payment of the costs of the motion, though the cause had been twice brought to trial; on the first trial, the plaintiff was nonsuited, a new trial was granted; on the second trial the defendant objected, for the first time, that the demise was laid before the title accrued, and moved for a nonsuit; the Judge overruled the objection; the defendant excepted, and the Judge signed a Bill of Exceptions upon the point. *Jackson ex dem. Hills vs. Tuttle*, 6 Cowen's Rep. 590.

Upon the trial of an Ejectment the plaintiff offered in evidence a deed to his lessors, bearing date *after* the demise laid in the declaration, to the admission of which deed the defendant objected, but the Court admitted it to be read in evidence, saying, the date of the demise was immaterial, or the plaintiff might amend his declaration, which he did, before the jury retired from the bar, by altering the date of the demise. Upon a bill of Exceptions taken upon this point, the Supreme Court of the United States *Held*, that the amendment "was properly allowed." Although, the Supreme Court was "of opinion, that the Circuit Court erred in saying that, "it was unnecessary to prove a title in the lessor of the plaintiff at the date "of the demise laid in the declaration." *Blackwell vs. Patton & Erwin's Lessee*, 7 Cranch's Rep 472, 478.

The time of the demise may be amended after nonsuit, on the ground that the lessor of the plaintiff was a *Feme Covert* at the time of the demise. *Den ex dem. Hoover vs. Franklin & Al.*, 2 South. Rep. 850.

If the term of a demise in the declaration in an action of Ejectment expired before the verdict and judgment in the court below, the judgment is erroneous, and on appeal will be reversed. *Roseberry & Stevens vs. Seney & Al. Lessee*, 3 Harr. & Johns. Rep. 228.

In such case the court below, under a *Procedendo* directing a new trial, may enlarge the term of the demise. *Ibid*.

mise to be altered to a day subsequent to the day of the delivery of the declaration, for this would be to give the lessor of [ \*204 ] the plaintiff a right of action which did not subsist at the time of the commencement of his suit.(s)

The term, also, has been enlarged after its expiration, upon payment of costs, although the issue was made up, the special jury struck, and the cause gone down to trial, before the mistake was discovered ;[1] the

(s) *Doe, d. Pozlow, v. Jeffries, K. B. M T. 1814—MS.*

An amendment may be made to a declaration in Ejectment, so as to change the demise from a joint one by all the lessors, to separate demises for undivided portions. *Hutching vs. Talbot & Al. Lessee, 3 Harr. & Johns. Rep. 378.*

The change of the name of the fictitious lessee in the amended declaration is of no consequence, the defendant having afterwards appeared to it and entered into the common rule. *Ibid.*

*Quere.* If it may not then be considered a new action. *Ibid.*

[1] In Ejectment, an amendment, so as to enlarge the term laid in the declaration, will be permitted in the discretion of the court ; but where a court refuses to allow such amendment it is no ground for writ of error. *Walden ex dem. Denn vs. Craig, or rather Den ex dem. Walden vs. Craig, 9 Wheat. Rep. 576.*

That the term stated in a declaration in Ejectment, has expired previous to the decision on an appeal, is a circumstance of no importance. *Baker vs. Seekright, Lessee of Glasscock, 1 Hen. & Munf. Rep. 177.*

In ejectment, if the term stated in the declaration, expire, before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term. *Hunter vs. Fairfax's Devisee, 1 Munf. Rep. 218.*

Before trial, the declaration in Ejectment may be amended, by enlarging the term, or adding a new demise, on payment of costs. *Lion ex dem. Eden & Al. vs. Burtiss & Al. 18 Johns. Rep. 510.*

But where there was an actual entry and actual lease, for the purpose of avoiding a fine, and the demise in the declaration was, by mistake, laid on the *first*, instead of the *sixth* day of *May* ; the court, in allowing the amendment, gave the defendant leave to elect within twenty days, whether to defend the suit or not ; and if he chose to defend, then to have the costs of the amendment only ; but if he abandoned his defence, then he should have costs to the time of his election. *Ibid.*

*Quere.* Whether the judge, at the trial, can allow the amendment in such a case ? *Ibid.*

If the objection, on the ground of variance, is made at the trial, and the plaintiff is nonsuited, it *seems*, that the court will set aside the nonsuit, and give leave to amend on payment of costs. *Ibid.*

Where the judge at the trial refused a nonsuit, but reserved the question as to the variance, and the defendant went into his defence fully at the

Court considering, that it was a plain mistake in the declaration, and might be amended by the writ, which spoke of a term not yet expired.<sup>(t)</sup> An enlargement of the term was also permitted, by Lord *Mansfield*, in a case where a judgment in ejectment in Ireland had been affirmed, upon a writ of error, in the King's Bench in England, but, from various delays, the term in the declaration had expired before the plaintiff's lessor could obtain possession.<sup>(u)</sup>[2]

When the old principles of the action prevailed, and the term was considered substance, and not amendable, the plaintiff was not nonsuited if the term expired before the trial, but was permitted to proceed for his damages and costs, though not for the recovery of his land; for the right to damages for the ouster remained, although the right to possession upon the

(t) *Roe, d. Lee, v. Ellis*, Blk. 940.

(u) *Vicars v. Heydon*, Cowp. 841

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trial, the plaintiff was allowed, after verdict, to amend his declaration on the usual terms, under the circumstances of the case, it being a mere clerical mistake. *Ibid.*

In Ejectment if the lease laid in the *Narr.* have expired, the enlargement of it is an amendment in matter of form, and it is error under act of *March*, 1806, [*Pennsylvania*] if the court refuse it. *Maus' Lessee vs. Montgomery*, 10 *Serg. & R. Rep.* 192.

[2] Where a statement was filed against one defendant only, before the first term, and afterwards the sheriff added the name of another person found in possession as defendant, according to the acts of Assembly; it was *Held*, that the statement was good, and that if it was necessary to add the name of the other defendant, the court below might have permitted an amendment accordingly, even after verdict and judgment, and the Supreme Court would consider such amendment as having been made.—*Irish & Al. vs. Scovell*, 6 *Binn. Rep.* 55.

Where judgment in Ejectment had been entered in the Common Pleas, and possession delivered after the expiration of the term laid in the declaration, this court [SUPREME COURT of *Pennsylvania*,] permitted the term to be enlarged by the defendant in error, on paying the costs of the writ of error. *Riddle, Esq. vs. Lessee of Findlay & Al.*, 6 *Serg. & R. Rep.* 227.

A motion to enlarge the term in Ejectment in order to support an execution, was refused after a lapse of thirteen years from the judgment, and five years from the expiration of the term, and after a new party had come into possession. *Campbell & Al. Adm'rs. &c. vs. Grantz's Lessee*, 6 *Binn. Rep.* 115.

Where the term laid in the declaration expires after verdict for the plaintiff, and a rule to show cause why a new trial should not be granted, the court will allow it to be granted. *Lessee of Woods, vs. Galbreath*, 2 *Yeates' Rep.* 536.

lease was determined.[3] It is not probable, at the present day, that opportunity will be offered to raise a point of this nature; but if the lessor of the plaintiff should act so negligently as to proceed to trial upon an expired term, there seems no reason why the above mentioned principle should not be applicable to the modern practice.(v)

\*In the case of *Goodtitle v. Meymott*, the court refused to [\*205] amend a declaration, in which "the said James," instead of "the said John," was said to enter by virtue of the demise; and a case was cited, by *Wright, J.*, in which the premises were laid to be in Twickenham, or Isleworth, "or one of them," and the court refused to let the plaintiff amend, by striking out the disjunctive words; but it seems that amendments have since been permitted, both in the parcels and the names.(w)[1] And, in a recent case, where after issue joined, a summons was taken out to show cause why the declaration and issue should not be amended, upon payment of costs, by altering the parish, from *the parish of G.*, to "*the parish of St. John in G.*," the judge per-

(v) *Capel v. Saltonstall*, 3 Mod. 249.

(w) 2 Sell. Prac. 143.

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[3] Vide "*Revised Statutes*" of New-York, Part 3, Chap. 5, Tit. 1, § 31, Vol. 2, p. 308. (Cited ANTE Page 34, n. [1].)

When the term of the plaintiff in Ejectment expires before the trial, although possession of the property cannot be recovered, yet he may proceed for damages for the trespass and for the *mesne profits*. *Lessee of Brown vs. Galloway*, 1 Peters' Circ. Ct. Rep. 291, 299.

The general rule is, that a plaintiff in Ejectment shall recover according to his right at the time of the suit brought; but if pending the suit, his title is divested either by act of law or by his own act, he shall not recover possession adverse to the will of the party in whom the title is vested, but he is entitled to his damages and costs. *Lessee of Rugan & Al. vs. Philips & Al.* 4 Yeates' Rep. 382.

So a plaintiff in Ejectment brought under the acts of 1806 and 1807, may recover the nominal damages and full costs although he has conveyed the title to a third person pending the suit. *Murray vs. Garretson*, 4 Serg. & R. Rep. 130.

[1] In Ejectment where the rights of the defendant are not affected by the proceedings, or he consents, the name of a lessor may be stricken out on motion in behalf of such lessor, at any stage of the proceedings, though he originally consented to its insertion; but it must be on payment of his share of the costs to the plaintiff's attorney. *Jackson ex dem. Sutherland & Al. vs. Stiles*, 5 Cowen's Rep. 418.

mitted the amendment,[2] and refused to allow the party to plead *de novo*, notwithstanding the case of *Goodtitle v. Meymott*.(x)

### OF THE NOTICE TO APPEAR.(y)

The name of the tenant in possession[3] must be prefixed to the notice; and, when the possession of the disputed premises is divided amongst several, it is usual to prefix the names of all the tenants, to each separate declaration; although it does not seem necessary to prefix more than the name of the individual tenant, upon whom the particular declaration is served.(z)

(x) *Doe, d. O'Connell, v. Porch—Coram*  
*Heath, J. Trin. Vac. 1814. MS.*

(y) Appendix, No. 13.  
(z) *Roe, d. Burlton, v. Roe, 7 T. R. 477.*

[2] Amendment, as to the place laid in the declaration in Ejectment granted, upon payment of costs. after the plaintiff had been nonsuited at the trial for the variance. *Jackson ex dem. Sinclair & Al. vs. Bailey, 5 Cowen's Rep. 265.*

[3] The "*Revised Statutes*" of *New-York*, Part 3, Chap. 5, Tit. 1, §§ 12, 13, 14 & 15, (*Vol. 2, p. 30b.*) contain the following enactments.

" § 12. To such declaration there shall be subjoined a notice in writing by the plaintiff or his attorney, addressed to the defendant, and notifying him,

" 1. That the said declaration will be filed on some day in the then next term of the court in which the action is brought, specifying such day, or if the same be served during the term of any court, that it will be filed on some day in such term, specifying the same :

" 2. That upon filing the same, a rule will be entered, requiring such defendant to appear and plead to such declaration, within twenty days after the entry of such rule : and,

" 3. That if he neglect so to appear and plead, a judgment by default will be entered against him, and the plaintiff will recover possession of such premises.

" § 13. If the premises are actually occupied, the declaration shall be served by delivering a copy thereof, with the notice above prescribed, to the defendant named therein, who shall be in the occupation thereof, personally, or by leaving the same with some person of proper age at the dwelling-house of such defendant, if he be absent.

" § 14. If the premises claimed are not actually occupied, the declaration and notice shall be served on the defendant named therein, personally, or if he cannot be found, by leaving the same with some person of proper age, at the residence of such defendant.

" § 15. But where the declaration shall have been served in any other manner than upon the defendant, personally, no rule to plead shall be entered, without the special order of the court."



to the declaration, so as to imagine he had until *Trinity* term to [ \*207 ] appear, inasmuch as \*the declaration was delivered, and the notice dated on a day antecedent to the essoign day of *Easter* term.(d)

When the premises are situated in any other county than London or Middlesex, the notice should regularly require the tenant to appear generally in the term next ensuing the delivery of the declaration; but it will be sufficient when the proceedings are in the Common Pleas, if it require him to appear in the *issuable* term, next ensuing such delivery, although a nonissuable term intervene. Thus, when a declaration is entitled of *Trinity* term, and delivered during the long vacation, the notice may require the tenant to appear in *Easter* term.(e)

The declaration must be delivered before the essoign day of the term, in which the notice is given to appear.(f)[1]

The notice should regularly be subscribed with the name of the casual ejector, and formerly proceedings have been set aside for an irregular signature; but it is now sufficient, though certainly not correct; if the notice be subscribed with the name of plaintiff in the action.(g)[2]

[ \*208 ] One case only is extant, in which an amendment has \*been made, by rule of court, in the notice subscribed to the declaration; although it cannot be doubted that any amendments would now be allowed, which the justice of the case might require. In the case above alluded to, the lands were situated in Devonshire, and the notice was for the tenant to appear in *Michaelmas* term, when, according to the

(d) *Anon.* K. B. E. T. 1817. MS.

(e) *Doe, d. Clarke, v. Roe*, 4 Taunt. 738.

(f) *Doe, d. Bird, v. Roe*, Barns. 172.

(g) *Peaceable v. Troublesome*, Barn. 172.

*Hazlewood, d. Price, v. Thatcher*, 3 T. R. 351.

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[1] If a declaration in Ejectment be not served ten days prior to the first day of the term, the tenant has until the first day of the subsequent term to appear and enter into the consent rule. *Den. ex dem. Wade vs. Fen.* 3 *Halsted's Rep.* 133.

[2] The notice to the tenant in possession at the foot of the declaration in Ejectment, need not be in the name of the plaintiff; but, if in the name of the lessor of the plaintiff, or even any other person, the court will permit the rule for judgment against the casual ejector to be drawn up. *Goodtitle dem. Duke of Norfolk vs. Nottile.* 5 *Barnew. & Ald. Rep.* 849:

practice in country causes at that time, it should have been to appear in an issuable term, and the affidavit stated, that if the lessor were not permitted to amend, he would be barred, by the statute of limitations, from bringing a new ejectment: the court permitted the lessor to amend upon payment of costs. (*h*)

(*h*) *Doe, d. Bass, v. Roe*, 7 T. R. 469. It is singular, that a practice should have obtained of giving notices to tenants to appear

in *nonissuable*, as well as *issuable* terms, and that such change of practice should not have been noticed in any of the reported cases.—



## CHAPTER VIII.

[OF THE SERVICE OF THE DECLARATION, AND PROCEEDINGS TO  
JUDGMENT AGAINST THE CASUAL EJECTOR, WHEN NO  
APPEARANCE.

THE declaration in ejectment being a kind of process to bring the party interested into court, its delivery to the tenant resembles the service of a writ,[1] rather than the delivery of a declaration; and, as it is the only warning which the tenant in possession receives of the proceedings of the claimant, the courts are careful that a proper delivery be made, and that the nature and contents of the declaration be explained at the time, to the party to whom it is delivered.[2] This delivery and explanation are generally termed *the service of the declaration*; and our next inquiry will be directed to the different modes by which this service may be made.

The service, to be strictly regular, should be made personally upon the party in possession of the premises, at the time of the service;[3]

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[1] The commencement of an Ejectment is the service of notice, and the seven years limitation [*Kentucky*] does not apply to Ejectments brought before the first of *January*, 1816. *Taylor & Al. vs. Taylor & Al.* 3 *Marsh. Rep. (Ky.)* 19.

In Ejectment the declaration and notice must be entered on the record at the term it is returnable, or it is discontinued; and proceedings at a subsequent term are irregular, though when noted on record at the proper term, the suit has relation to the service of the notice. *Stair vs. Picketts*, 3 *Marsh. Rep. (Ky.)* 551.

[2] Where a printed declaration and notice in Ejectment were served upon an illiterate tenant, who was told merely that they were a declaration in Ejectment, without any further explanation, but it appeared from *circumstances* that he must have known the nature of the papers, the court considered this equivalent to a technical service. *Jackson ex dem. Beaver vs. Stiles*, 1 *Cowen's Rep.* 222.

[3] Where a defendant, on being served with a declaration in Eject-

or, when the possession is divided \*amongst several, upon each [ \*210 ] party separately.(i)[1] When the ejectment is brought by a landlord against his tenant, and the tenant has underlet the premises, the same rule prevails, and the service should be upon the under-tenant. A service upon the original tenant might, perhaps, be sufficient ; but a doubt exists upon the point, and it is, therefore, more prudent to serve the under-tenant. If, however, the service is upon the original tenant, and he appears and pleads, he cannot afterwards release himself from the action, upon the ground that his under-tenants, and not himself, are in possession;(j) and, from the language of the Court, when giving judgment upon this point, it seems an inference may be drawn, that a service on the original tenant will also be sufficient to warrant a judgment against the casual ejector.

When personal service can be effected, it is immaterial whether it be upon the premises demised, or elsewhere.(k)[2]

It frequently, however, happens, from the wilful or accidental absence of the tenant, or some other circumstance, that the claimant is unable to serve him personally : the declaration is then delivered to one of the

(i) B. N. P. 98.

(j) *Roe v. Wiggs*, 2 N. P. 330.

(k) *Savage v. Dent*, Stran. 1064. *Taylor v. Jeffs*, 11 Mod 302.

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ment, assented to the character of tenant in possession, and afterwards appeared and pleaded : *Held*, that it was quite sufficient evidence for a jury to find that he was the tenant in possession, although it also appeared that he was in the situation only of a servant, and managed the business for the real owner on the premises. *Doe ex dem. James & Al. vs. Stanton*, 2 *Barnew. & Ald. Rep.* 371.

[1] *Vide* POST Page 212, n. [2].

Several tenants, claiming severally parts of the land sued for, may be sued in one action of Ejectment. *Camden & Al. vs. Haskill*, 3 *Rand. Rep.* 462.

An Ejectment may be brought against several persons in possession of any part of the tract of land claimed by the lessor of the plaintiff. *Stewart's Heirs, &c. vs. Coalter*, 4 *Rand. Rep.* 74.

[2] *Vide* ANTE Page 205, n. [3].

Service of notice in Ejectment upon the land which was occupied by the slaves of the defendant, was held good, although the defendant resides elsewhere. *Doe ex dem. Clay & Al. vs. Woods & Al.* 1 *Marsh. Rep. (Ky.)* 152.

family, nailed to the door of the house, or in some other manner left upon the demised premises; [3] and, when any of these irregularities \*happen, the service will be considered good, or otherwise, [ \*211 ] according to the particular circumstances of the case.

The power exercised by the courts in this respect is altogether discretionary; and it will be necessary to enter rather largely into a detail of the cases, in order to give a clear idea of the principles upon which they have been decided.

When the declaration is explained to, and left with, the wife upon the premises, [1] or at the husband's house elsewhere, it will be good service; (l) and, as the husband is answerable for the default of the wife, no evidence seems necessary of a subsequent delivery of the declaration from her to him. It seems, also, that the service on the wife will be good any where; provided it be sworn, in the affidavit of service, that she and her husband were living together as man and wife when the service was made. (m) But the mere acknowledgment of the wife, that she has received a declaration in ejectment, and given it to her husband, if it

(l) *Doe, d. Baddam, v. Roe*, 2 B & P. 55. 765.  
*Goodright, d. Jones, v. Thrustout*, W Blk. (m) *Jenny, d. Preston, v. Cutts*, 1 N. R.  
 800. *Doe, d. Moreland, v. Bayliss*, 6 T. R. 808.

[3.] Where the tenant of a house locked it up and quitted it, and the landlord three months afterward fixed a copy of a declaration in Ejectment to the door: *Held*, that the service was not sufficient, but that the landlord should have treated it as a vacant possession. *Doe ex dem. Ld. Darlington vs. Cock*, 4 *Barnew & Cress. Rep.* 259.

A notice at the bottom of a declaration in Ejectment affixed to the door of an empty house, addressed to the personal representatives of the deceased tenant, generally, was *held* insufficient; as, if there had been representatives who had taken possession, they should have been addressed by name; if not, the lessor of the plaintiffs should have proceeded as in the case of a vacant possession. *Doe ex dem. The Governor of the Hospital of Saint Margaret, Westminster, vs. Roe*, 1 *Moore's Rep.* 113.

[1] In the case of *Jackson ex dem. Salisbury vs. Salisbury*, (3 *Wend. Rep.* 430.) the declaration was served by delivering it to the wife of the defendant on the premises claimed. The service not being on the defendant personally, leave was asked, pursuant to the "*Revised Statutes*," (Part 3. Chap. 5, Tit. 1, § 15, *Vol. 2. p.* 305,) to enter a rule for the defendant to appear and plead, which was granted.

The section of the "*Revised Statutes*," above cited, is in the following terms:

"§ 15. But where the declaration shall have been served in any other manner than upon the defendant, personally, no rule to plead shall be entered, without the special order of the court."

be not personally served upon the wife, will not be good service;(n) although, in a case in the Common Pleas, where the service was upon the daughter before the essoign day, and on a subsequent day, the wife acknowledged that she had received the declaration, and *showed it to the attorney, who then read it over to her, and explained it*, upon which \*the wife said, that the paper should be sent to her husband, [ \*212 ] the service was held sufficient.(o)

The court were at first much inclined to refuse the rule, in this latter case; because it did not clearly appear from the affidavit, that the declaration came to the hands of the wife before the essoign day of the term, but ultimately made the rule absolute on the authority of the case of *Goodtitle, d. Massa, v Thrustout*.(p) In the court of King's Bench, such an omission would be a fatal objection to the service.(q)[1]

When two tenants are in possession of the same premises, service upon one of them will be good service upon both;(q)[2] but service upon the wife of one of two tenants in possession will not bind the co-tenant.(r)[3]

(n) *Goodtitle, d. Read, v. Badtittle*, 1 B. & P. 334.

(o) *Smith, d. Lord Stourton, v. Hurst*, 1 H. Blk. 644.

(p) Barn. 188.

(q) *Doe, d. Bailey, v. Roe*, 1 B. & P. 369.

(r) Wood. L. & T. 468

[1] Where a declaration in Ejectment was left at the house of the tenant on Saturday, and the tenant afterwards acknowledged that he received it on the following Sunday, (which was before the essoign day): *Held*, that this was not good service. *Doe vs. Roe*, 5 *Barnew. & Cress. Rep.* 764.

[2] In Ejectment for premises which had been demised on lease to one person, who had underlet to others, it was held to be necessary to serve all the under-tenants with a copy of the declaration. *Doe ex dem. Ld. Darlington vs. Cock*, 4 *Barnew. & Cress. Rep.* 259.

One Ejectment may be maintained against several defendants holding under separate titles, who may defend under their respective titles. *White & Al. vs. Lessee of Pickering & Al.* 12 *Serg. & R. Rep.* 435.

[3] The return of the marshal, of service of the declaration in Ejectment, stating that he had served it on *H.* and *C.* on the premises, by showing it to *H.* and delivering a copy at the dwelling house of *H.* and *C.* on the premises, said *C.* being absent, and the copy left in the presence of his wife, is defective, in not stating that a copy of the declaration was delivered to *H.* and another to the wife of *C.*, and that the notice was read and explained to them. It should also have stated that *H.* and *C.* were tenants in common. *Lessee of Campbell vs. Harper & Al.* 3 *Wash. Circ. Ct. Rep.* 356.

If both tenants inhabit one house and this appears by the return, it is sufficient to deliver one copy. *Ibid.*

Service of the declaration upon the child, or servant, of the tenant, will be held sufficient service by the court of Common Pleas; provided it appears from the affidavit, that the declaration was delivered on the premises before the essoign day of the term,<sup>(s)</sup> and that the tenant has since acknowledged the receipt of such declaration; but in the court of King's Bench it must also appear, upon the affidavit, that the tenant has acknowledged himself to have received such declaration, or to have known of the service thereof, previously to the essoign day of the term.<sup>(t)</sup>

[ \*213 ] Where the ejectment was brought for a house, which <sup>\*</sup>was rented by the churchwardens and overseers of the parish, for the purpose of accommodating some of the parish poor, a service of the declaration upon the churchwardens and overseers was held sufficient, although they did not occupy the house, otherwise than by placing the poor in it.<sup>(u)</sup> And in an ejectment for a chapel, the service may be made on the chapel-wardens, or on the persons to whom the keys are intrusted.<sup>(v)</sup> But where the ejectment is for a house, service upon the person having the charge of the keys in order to let the house, will not be good service;<sup>(w)</sup> and service upon a person appointed by the Court of Chancery to manage an estate for an infant, although the estate consisted of a large wood, of which no tenant was in possession, has also been held insufficient, as being nothing more than a service on a gentleman's bailiff.<sup>(x)</sup>

In the preceeding cases no wilful opposition appears on the part of the tenant, to the service of the declaration; and such of the services already mentioned as are considered good, are called *regular services*; but when the tenant absconds, or does any act which shows a resolution not to receive the declaration, the Court, upon affidavit of facts, will sometimes allow that to be good service, which otherwise would be deemed *irregular*.

Thus, a tender of the declaration, and reading the notice aloud, although the tenant refuse to receive it, or run away and shut the doors, or threaten with a gun to shoot the person serving it, if he should come

(s) *Smith, d. Lord Stourton, v. Hurst*, 1 H. Blk. 644.

(t) *Roe, d. Hambrook, v. Doe*, 14 East, 441. *Doe, d. Wilson, v. Roe*, T. T. 1915.—  
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(u) *Tupper, d. Mercer, v. Doe*, Barn. 181.

(v) *Run. Eject* 136.

(w) *Anon.* 12 Mod. 313.

(x) *Goodtitle, d. Roberts, v. Badtittle*, 1 B. & P. 385.

near; throwing the declaration in at the window, sticking it against the door, \*or leaving it at the house, upon the servants refusing to call their master, and the like, have, upon application to the court, been holden sufficient. So, also, a tender of the declaration in the shop, and reading the notice aloud there to the wife, when the tenant refused to receive the declaration; delivering it to the niece of the tenant, she being the manager of the house, and the tenant having absconded; nailing the declaration on the barn door of the premises, in which barn the tenant had occasionally slept, there being no dwelling-house on the premises, and the tenant not to be found at his last place of abode, have respectively been considered good and sufficient services.(y)

In a case where the tenant in possession was personated, at the time of the service, by another, who accepted the service in her name, the Court granted a rule to show cause, why this should not be deemed good service upon the tenant herself, and why judgment should not be signed against the casual ejector, in default of her appearing: and that, leaving a copy of this rule at her house, with some person there, or, if no one was to be met with, affixing it to the door, should be good service of such rule. And this rule was afterwards made absolute, upon an affidavit, "that the tenant was either not at home, or (if at home) was denied; and, that her servant-maid was at home, but could not be served; whereupon a copy of the rule was affixed to the door of the house;" and moreover, "that at a subsequent \*day," (upon a doubt whether what had been already done was sufficient,) "the maid being at home, and opening the window, but refusing to open the door, and denying that her mistress was at home, another copy was affixed on the door, and the maid was told the effect of it; and another copy was thrown in at the window, and the original rule was shown to the maid."(z)

In a case, where it appeared in the affidavit of service, that one of the tenants was a lunatic, and that one C. lived with her, transacted her business, and had the sole conduct thereof, and of her person; but would not permit the deponent to have access to her, in order to serve her with

(y) *Douglas, v. —*, Stran. 575. *Smalley v. Neale*, Barn. 171. *Halsal v. Wedgwood*, Barn. 174. *Doe, d. Dry, v. Roe*, Barn. 178. *Furmer, d. Miles v. Thrustout*, Barn. 180. *Bagshaw, d. Ashton, v. Toogood*, Barn. 185. *Short, d. Elmes, v. King*, Barn. 188. *Fenn,*

*d. Hildyard, v. Dean*, Barn. 192. *Sprightly, d. Collins, v. Dunch*, Burr. 1116. *Doe, d. Neale, v. Roe*, 2 Wils. 268. *Fenn, d. Duckie v. Roe*, 1 N. R. 293. *Doe, d. Hervey v. Roe*, 2 Price, 112.

(z) *Fenn, d. Tyrrel, v. Dena*, Burr. 1181.

the declaration, whereupon he delivered it to the said *C.*; a rule was granted that the lunatic and *C.* should both show cause, why such service should not be sufficient; and the service on *C.* was allowed to be good.(a)

But where, on cause being shown against a rule for good service of a declaration in ejectment, it appeared, that the declaration was tendered on the 18th, but that the defendant's servant said, he had orders not to receive any such thing; whereupon it was not served on that day, but was left at the house upon the day following; the Court, (notwithstanding that the defendant knew of the intention to serve him,) said, "You should have left the declaration on the 18th. We sometimes by rule make that service, under particular circumstances, good, which otherwise would have been imperfect; but here there was no service on the proper day, and we cannot antedate the service;" and the rule was discharged.(b)

[ \*216 ] \*Where the premises consisted of a mansion, and four small houses in a yard, surrounded by a wall, through which was a door to them, forming the only means of access, in one of which small houses resided *A.*, who was permitted to live there merely to take care of them and of the mansion-house, and the rest of the messuages were vacant: upon motion, that service on *A.* might be deemed good service under those circumstances, the Court refused the motion, and recommended the plaintiff to affix a declaration on the empty houses, and then to move that it be deemed good service.(c)

When the service is good for part, and bad for part, the lessor may recover those premises for which the service is good; but if he proceed for all, and obtain possession by means of a judgment against the casual ejector, the Court will compel him to make restitution of that part, for which the service was bad.(d)

#### OF THE AFFIDAVIT OF SERVICE.(e)[1]

(a) *Doe, d. Wright, v. Roe*, Barn. 190.

(b) *Wood. L. & T.* 466.

(c) *Ibid.* 464.

(d) *Ibid.* 463. Appendix, No. 41.

(e) Appendix, No. 16, 17, 18.

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[1] The "*Revised Statutes*," Part 3, Chap. 5, Tit. 1, § 16, (*Vol. 2, p. 305*.) contain the following enactment:

"§ 16. Instead of the rule to appear and enter into the consent rule, as heretofore accustomed, the plaintiff, on the day specified for that pur-

When the service of the declaration is made in the regular way, the next step to be taken, in order to obtain judgment against the casual ejector, is to make an affidavit of such service; which affidavit is annexed to the declaration, and is the ground upon which the rule for judgment is to be moved for. But, when the circumstances of the case are special, it is usual to move, in the first instance, for a rule to show cause why the service mentioned in the affidavit, should not be deemed good service; and this motion may be made, either before, or after the service of the declaration; although, if the lessor be [\*217] aware of the difficulties he will have to encounter, it is better to make an affidavit of the circumstances, which are likely to happen, and move, prior to the service, for a rule to show cause, why a service of such a nature should not be sufficient.(f)

The affidavit may be sworn before a judge, or a commissioner, and should regularly be made by the person who served the declaration; although the Court have been satisfied with the affidavit of a person, who saw the declaration served upon, and heard it explained to, the tenant in possession.(g)

When no special circumstances take the case out of the general rule, the affidavit must state that the declaration was delivered to the tenant in possession,[1] or his wife, &c. and that the notice, thereto annexed, was

(f) *Methold v. Norright*, W. Blk. 280. *Guliver v. Wagstaff*, W. Blk. 317.

(g) *Goodtitle, d. Wanklen, v. Badtitle*, 2 B. & P. 120.

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“pose in the notice aforesaid, or on some other day thereafter. upon filing the declaration, with an affidavit of the due service of a copy thereof, and of the notice herein before required, shall be entitled to enter a rule requiring the defendant to appear and plead, within twenty days after the entering of such rule; and in case the defendant shall neglect so to appear and plead within such time, his default shall be entered.”

Affidavit of service is necessary only where it is not done by an officer of the court. *Lessee of Campbell vs. Harper & Al.*, 3 Wash. Circ. Ct. Rep. 356.

Under the act of the 13th of April, 1807, section 2, [*Pennsylvania*,] the sheriff's return of, served in Ejectment, is *prima facie* evidence, that the person on whom such service is made, is in possession, whether he be or be not the party named in the writ. *Gratz & Al. vs. Benner*, 13 Serg. & R. Rep. 110.

[1] *Vide ANTE* Page 211, n. [1].

In Ejectment the affidavit to be sufficient must allege that the persons



read and explained at the time of the delivery, or generally that the tenant was informed of the intent and meaning of the service.<sup>(h)</sup> If the affidavit only state that the notice was *read*, the service will not be sufficient.<sup>(i)</sup> unless the tenant afterwards acknowledge that he understands the meaning and intention of the service; but with such acknowledgment the service will be good, without any statement of the reading or explanation of the notice or service.<sup>(j)</sup>

If the service was upon the wife, the affidavit must also [ \*218 ] state that the service was on the premises, or at the husband's house,<sup>(k)</sup> or that the husband and wife were living together,<sup>(l)</sup> and, if the service were on the child or servant of the tenant, "that the service was afterwards acknowledged by the tenant," and also, provided the proceedings are in the King's Bench, that the tenant received the declaration, or acknowledged that he knew of the service thereof,<sup>(m)</sup> before the essoign day of the term.<sup>(n)</sup>

The affidavit must be positive, that the person, to whom the notice was addressed, was the tenant in possession, or that he acknowledged himself to be so; for no one should be evicted from possession without a positive affidavit, on which, if it be false, the person who made it may be subject to the penalties of perjury.<sup>(o)</sup> An affidavit, therefore, that the deponent did serve *A B.*, tenant in possession, or *his wife*, was held not to be sufficiently certain as to either.<sup>(p)</sup> So also an affidavit, that

(h) Appendix, No. 16, 17, 18.

(i) *Doe, d. Whitfield, v. Roe*, K. B. T. T. 1815.—MS.

(j) *Doe, d. Quintin, v. Roe*, K. B. T. T. 1816.—MS.

(k) *Doe, d. Morland, v. Bayliss*, 6 T. R. 765.

(l) *Jenny, d. Preston, v. Cutts*, 1 N. R. 308.—Appendix, No. 18.

(m) *Doe, d. Wilson v. Roe*, K. B. T. T. 1815.—MS.

(n) *Roe, d. Hambrook, v. Doe*, 14 East, 441.

(o) *Anon.* 1 Barn. 830. *Goodtitle v. Davis*, 1 Barn. 427.

(p) *Birkbeck v. Hughes*, Barn. 173.

were tenants in possession, and that they were served with copies of the declaration, and notice. *Wharton vs. Clay*, 4 *Bibb's Rep.* 167.

Whether the tenant, in Ejectment, is in possession, is not a question upon the merits, but merely of irregularity, and affidavits may be heard upon it on both sides. *Jackson ex dem. Beaver vs. Stiles*, 1 *Cowen's Rep.* 222.

It must appear by affidavit that the declaration and notice were served upon the tenant in possession, before a default can be taken against the casual ejector. *Ibid.*

the deponent did serve the wives of *A.* and *B.*, who, or one of them, are tenants in possession, was held insufficient.(q)

If several persons be in possession of the disputed premises, and separate declarations in ejectment be served upon them, one affidavit of the service upon all, annexed to the copy of one declaration, is sufficient, provided one action of ejectment only be intended ;(r) but if the ejectments are made several, so as to have separate judgments, writs of possession, &c., then separate affidavits, of the several services upon the different tenants, must be annexed to copies of the several declarations respectively.(s)

When one action only is intended, the names of *all* the tenants are generally prefixed to each notice ; but in a case where, in the several declarations served, the name of the individual tenant alone, to whom any particular declaration was delivered, was prefixed to the notice to such declaration, instead of the names of all the tenants, so that the person making the affidavit of service could not swear that a copy of any *one* declaration and notice had been served on *all* the tenants, the Court, notwithstanding, thought one rule sufficient, on motion for judgment against the casual ejector.(t)

It often happens that an affidavit of the service of the declaration is defective ; as, for example, from not stating the particular mode in which the party was served ;(u) in such case, a supplemental affidavit should be made, and taken to the clerk of the rules, who will attend a judge thereon, and obtain an order to draw up the rule for judgment.

#### OF JUDGMENT AGAINST THE CASUAL EJECTOR.(v)[1]

(q) *Harding, d. Baker, v. Greensmith*,  
Barn. 174.

(r) Appendix, No 17.

(s) 2 Sell. Prac. 100.

(t) *Roe, d. Burlington, v. Roe*, 7 T. R. 477.

(u) *Jenny, d. Preston, v. Outts*, 1 N. R.

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(v) *Ante*, 216.

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[1] Vide "*Revised Statutes*," Part 3, Chap. 5, Tit. 1, § 6, Vol. 2, p. 304. (Cited *ANTE* Page 14, n. [1].)

A default for the tenants not appearing, must be entered before judgment by default can be entered against the casual ejector. *Jackson ex dem. Vrooman vs. Smith*, 1 Johns. Rep 106.

A default for want of a plea, must be entered against the casual ejector, and not against the tenant. *Jackson ex dem. Van Alen vs. Vischer*, 2 Johns. Cas. 106. *Same Case, Coleman's Cas.* 115. *Jackson ex dem.*

The motion for judgment against the casual ejector, in ordinary cases, is *of course*; that is, such only as requires the signature of a counsel, or sergeant; and after it is signed, it must be taken by the attorney to the clerk of the rules in the King's Bench, or to the secondary of the Common Pleas; as these motions will not be received in court [ \*220 ] \*unless there is something special in the service of the declaration: but when any special circumstances exist, the rule must be moved for as in other cases. The rule granted upon this motion is, that the judgment be entered for the plaintiff against the casual ejector by default unless the tenant in possession appear, and plead to issue, within a certain time mentioned in the rule.(w)[1]

The time for moving for judgment, as also the time for the defendant's appearance, is governed by the locality of the premises, and the time mentioned in the notice, when the defendant is to appear.

In the King's Bench, if the premises are situated in London, or Middlesex, and the notice requires the tenant to appear on the first day, or within the first four days of the next term, the motion for judgment against the casual ejector should regularly be made in the beginning of that term; and then the tenant must appear within four days, inclusive, after the motion, or the plaintiff will be entitled to judgment. If, however, the motion be deferred until the latter end of the term, the Court will order the tenant to appear in two or three days, and sometimes immediately, that the plaintiff may proceed to trial at the sittings after term; but, if the motion be not made before the last four days of the term, the

(w) Appendix, No. 20, 21, 22.

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*Quackenboss vs. Woodward*, 2 Johns. Cas. 110. Same Case, *Coleman's Cas.* 120.

In Ejectment at common law, judgment for want of an appearance must be against the casual ejector. *Gardinier vs. Lessee of Murray & Uz.* 4 Yeates' Rep. 560. (IN ERROR.)

[1] Vide "*Revised Statutes*," Part 3, Chap. 5, Tit. 1, § 16, Vol. 2, p. 305. (Cited ANTE, Page 216, n. [1].)

It is regular to take a rule upon the tenant in possession to appear on some day during the court to which the declaration is returned, and to sign judgment, if such appearance is not entered within the term prescribed; reserving, however, to the tenant the right to have the judgment vacated, if an appearance be entered afterwards and during the same term, if the session should continue beyond the period stated in the rule. *Lessee of Campbell vs. Harper & Al.* 3 Wash. Circ. Ct. Rep. 356.

tenant need not appear, until two days before the essoign day of the subsequent term.

\*In the Common Pleas, if the premises are situated in Lon- [ \*221 ] don or Middlesex, and the tenant has notice to appear in the beginning of the term, judgment against the casual ejector must be moved for, within one week next after the first day of every Michaelmas and Easter term, and within four days next after the first day of every Hilary and Trinity term,(x) except, it seems, when the tenant has absconded, and the proceedings are upon the statute of 4 Geo. II., and then the motion may be made at any time during the term; because the rule of 32 Car. II., relates only to declarations in ejectment, served upon tenants in possession.(y)

When the premises are situated in London or Middlesex, and the notice is to appear *generally* of the term, or being situated elsewhere, the notice is to appear in an *issuable* term, judgment must be moved for, both in the King's Bench and Common Pleas, during the term in which the notice is given to appear.

When the cause of action arises elsewhere than in London or Middlesex, and the declaration is delivered, with a notice to appear in *Michaelmas* or *Easter* term, if the ejectment be brought in the Court of Common Pleas, the rule for judgment may be moved for at any time during the next *issuable* term; but if the proceedings are in the Court of King's Bench, such motion must be made during the same term in which the tenant has notice to appear. If, however, the lessor of the plaintiff neglect to make this motion during that term, the Court will grant him a rule to show *\*cause* at any time during the next [ \*222 ] *issuable* term;(z) but if he delay to move for such rule, until within the four last days of such *issuable* term, he cannot make it absolute until the succeeding term.(a)

Notwithstanding this difference in the practice of the two courts, as to the time of moving for judgment against the casual ejector, the time for the appearance of the tenant is in both courts the same; that is to

(x) Reg. Trin. 32 Car. II. C. B.

(y) *Negative, d. Parsons, v. Positive*, Barn. 172. If the principle upon which this exception is taken be correct, it seems to extend to similar cases when the proceedings are at common law.

(z) *Doe, d. Pearson, v. Roe*, K. B. H. T. 1814. MS.

(a) *Goodtitle, d. Duke of Richmond, v. Badtitle*, K. B. H. T. 1814. MS.

say, he has in all cases, until four days after the next issuable term, to appear and plead: and if the lands be situated in Cumberland, or in any other county, where the assizes are held but once a year, whatever may be the term in which the notice is given, the tenant is not compellable to appear until four days next after the term preceding the assizes.

By a rule of the Court of King's Bench, which has been adopted by the Court of Common Pleas,<sup>(b)</sup> the clerk of the rules now keeps a book, in which are entered all the rules delivered out in ejectments, instead of that formerly kept, which contained a list of the ejectments moved. The entry must specify the number of the entry, the county in which the premises lie, the name of the nominal plaintiff, the first lessor of the plaintiff, with the words "and others," if more than one, and also the name of the casual ejector. And unless the rule for judgment be drawn up, and taken away from the office of the clerk of the rules within two days after the end of the term, in which the ejectment shall be moved, no rule is to be drawn up or entered, nor any proceeding had in such ejectment.

[ \*223 ] \*When the proceedings are in the King's Bench by bill, bail must be filed for the casual ejector before the judgment can be signed against him, or the Court will set the judgment aside;<sup>(c)</sup> but the bail need not be filed until after the rule for judgment is drawn up.<sup>(d)</sup>

The reason for this form seems to be, that there is no cause in court against the casual ejector, before bail is filed; and, therefore, nothing upon which to ground the judgment.<sup>(e)</sup> But where no bail was filed in ejectment, and a writ of error was brought, and it appeared by the attorney's books, that the attorney had his fee to file bail, but was since dead, the Court ordered bail to be filed *nunc pro tunc*, that no error might appear upon the record; because, as it was on the part of the defendant to file bail, therefore he should not be allowed to take advantage of his own error; and although the plaintiff proceeded without any bail filed by the defendant, yet as the defendant's attorney had had his fee to file such bail, and as there was no proper remedy against the defendant, be-

(b) M. T. 31 Geo. III. 4 T. R. 1 E. T. 48 Geo. III. 1 Taunt. 317.

(c) *Bouchier v. Friend*, 2 Show. 249.

(d) Gilb. Eject. 21.

(e) It has been said, that if the tenant appear, and the cause go on to trial, the Court

will not compel him (if the proceedings are by bill) to confess lease, entry, and ouster, unless common bail has been filed for the casual ejector; but this doctrine seems scarcely consistent with the modern principles of the remedy. Gilb. Eject. 22.

cause he had given the fee, nor against the attorney, because he was dead, it therefore became the justice of the court to set it right, that the plaintiff might have no mischief.(f)

In the time of Charles II. the Court published a rule,(g) that no person should be permitted to take out judgment \*against [ \*224 ] the casual ejector, without a certificate that a *latitat* had been taken out, and bail filed ; because the Court had no authority to proceed by bill, unless the defendant appeared to be a prisoner of the Court. But this certificate is not now required, nor is a *latitat* necessary ; for when the casual ejector finds common bail, he admits himself to be a prisoner of the court, and whether he came into court regularly by *latitat*, or not, yet the judgment is not *coram non judice*.(h)

When the time appointed for the appearance of the landlord, or tenant, has expired, it is not necessary to give a rule to plead, but judgment may at once be signed against the casual ejector, provided the party interested has neglected to appear ; which fact is ascertained by searching the ejectment books of the judges in the King's Bench and the prothonotary's plea book in the Common Pleas. A rule for judgment must then be drawn up with the clerk of the rules in the former, and the secondary in the latter court ; and an *incipitur* of the declaration made on a proper stamp, and also on a roll of that term. These must be then taken to the clerk of the judgments in the King's Bench, and to the prothonotary in the Common Pleas, (together, when the proceedings are in the Common Pleas, with a warrant of attorney for the defendant,) and judgment will then be signed accordingly.(i)

The judgment, however, must not be signed, until the afternoon of the day next after that on which the rule expires ; and if Sunday happen to be the last day, not until the afternoon of Tuesday.(j)

\*After the judgment is signed, the writ of possession must [ \*225 ] be made out, (together with the *præcipe* for it, if in the King's Bench,) and delivered to the sheriff, who will execute the same by giving possession of the premises to the plaintiff's lessor.

(f) Gilb. Eject. 22. This case seems scarcely applicable to the modern practice. (Vide post Writ of Error.)

(g) Reg. Trien. 14 Car. II. and Mich. 33 Car. II.

(h) Gilb. Eject. 22.

(i) App. No. 28.

(j) *Hyde, d. Culliford, v. Thrustout, Say.*

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Judgments against the casual ejector irregularly obtained, will, as a matter of course, be set aside ;[1] and as the situations of claimant and defendant in ejectment, are materially different, the courts are liberal in their rules for setting aside judgments against the casual ejector, although regularly signed ; and will grant them even after execution executed, upon affidavit of merits, or other circumstances, which at their discretion they may deem sufficient.(k)[2] The regular mode of setting

(k) *Doe, d. Troughton, v. Roe*, Barr. 1896.  
*Dobbs v. Passer*, Stran. 975. *Mason, d. Kendall, v. Hodgson*, Barn. 250. *Doe, d. Gro-*

*cer's Company v. Roe*, 5 Taunt. 205. *See*  
*vide Doe, d. Ledger, v. Roe*, 3 Taunt. 506.

[1] Inserting the word " Judgment," in the entry of the tenant's default for not appearing, &c. in an action of Ejectment, will not alter the legal effect of the entry ; but it will, notwithstanding, be good ; and the word Judgment, may be rejected as surplusage. *Jackson ex dem. Sutherland & Al. vs. Stiles*, 5 Cowen's Rep. 418.

Following this by a rule for judgment generally, without saying against whom : *Held*, a good rule for judgment against the casual ejector. *Ibid*.

Where the tenant swears to merits, and no trial has been lost, a regular default will be set aside, on payment of costs, to let in the tenant to defend his possession. *Jackson ex dem. Mentz vs. Stiles*, 4 Johns. Rep. 463.

The court will go further, to protect the possession, when it can be done without injury to the plaintiff's claim, than it is willing in other cases to proceed. *Jackson ex dem. Rosekrans vs. Stiles*, 1 Caines' Rep. 503.

So, where the plea and consent rule miscarried through mistake, and never reached the plaintiff's attorney, judgment by default, and writ of possession, were set aside, and a writ of restitution ordered, on payment of costs. *Ibid*.

A default was set aside on an affidavit of merits, and that the tenants supposed that the Supreme Court was held at the Circuit. *Jackson ex dem. Norton vs. Stiles*, 3 Caines' Rep. 133.

[2] Where there has been a judgment by default against the casual ejector, and a *habere facias possessionem* issued thereon, the court will, on affidavit of fraud or surprise, and of a real defence, and on payment of costs on the judgment, set aside the *habere* and order restitution. *Den vs. —*, 2 Halsted's Rep. 161, overruled *Den vs. Feren*, 1 Halsted's Rep. 431 ; where the same court denied their power to set aside an *habere* under similar circumstances.

In an action of Ejectment, the plaintiff obtained judgment against the casual ejector, and possession by writ under that judgment. At the second term thereafter, the landlord of one of the tenants in possession, moved the court to set aside the judgment. &c. A rule was granted for the plaintiff to shew cause, &c. At the next term the County Court set aside the judgment, awarded restitution as prayed, permitted the landlord to appear, ordered the action to be reinstated on the docket, and regular continuances to be entered therein. At this stage of the proceedings, the

aside such judgments is by rule of court, for the party having obtained the judgment to give up the possession ; but if the circumstances of the case require it, the courts will order a writ of restitution to be issued.(1)

(1) *Goodright, d. Russell, v. Noright*, Barn. 178. *Davis v. Doe*, W. Blk 892. Appendix, No 41.

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plaintiff moved the court for a reconsideration, and to set aside the order for restitution, as unduly obtained.

This being refused, the plaintiff appealed ; *Held*, that the setting aside a judgment against a *casual ejector*, on the motion of the landlord of the tenant in possession, awarding restitution of the premises, and ordering the action to be tried, is but an interlocutory proceeding from which an appeal will not lie ; and the refusal of the County Court to reconsider such proceedings does not alter the case. *Gover & Al. Lessee, vs. Cooley*, 1 *Harr. & Gill's Rep.* 7.



## CHAPTER IX.

## OF THE APPEARANCE—PLEA—AND ISSUE.

In the preceding chapter, the suit has been conducted to its termination, when no appearance is entered in pursuance of the notice subscribed to the declaration; we must now consider, who may appear and defend the action, and in what manner such appearance should be made.

Notwithstanding the power possessed by the courts of framing rules for the improvement of this remedy, the interference of the legislature has, at times, been called for, and it has been most beneficially exerted in regulating the appearances to the action. The tenant in possession, being the person *prima facie* interested, is, of course, the party on whom the declaration is always served; although it frequently happens in practice, that the lands belong to some third person out of possession, to whom such service can afford no information of the proceedings against him, and who, by the common law, has no remedy against his tenant, if he omit to give him notice of them. By the rules and practice of the courts, also, (for it would scarcely be correct to say by the common law,) the landlord, it seems, was not permitted to defend, even when he did receive notice, unless the tenant consented to be [ \*227 ] come a co-defendant with \*him ;(m) and no means existed by which the tenant could be compelled to appear, and be made such co-defendant.(n) This system occasioned great inconvenience to landlords. The tenants, from negligence or fraud, frequently omitted to appear themselves, or to give to the landlords the necessary notice : and although judgments against the casual ejector have been set aside, upon

(m) Lill. Pr. Reg. 674.

(n) *Goodright v. Hart*, Stran. 830.

affidavits of circumstances of this nature, the remedy was still very incomplete.(o)

To remedy these imperfections, by the statute 11 Geo. II. c. 19. s. 13., it is enacted, "That it shall and may be lawful for the court in which an ejectment is brought, to suffer the landlord or landlords to make him, her, or themselves defendant or defendants, by joining with the tenant or tenants, to whom such declaration in ejectment shall be delivered, in case he or they shall appear; but in case such tenant or tenants shall refuse, or neglect to appear, judgment shall be signed against the casual ejector for want of such appearance; but if the landlord or landlords, of any part of the lands, tenements, or hereditaments, for which such ejectment was brought, shall desire to appear by himself or themselves, and consent to enter into the like rule that, by the course of the court, the tenant in possession, in case he or she had appeared, ought to have done; then the court, when such ejectment shall be brought, shall and may permit such landlord or landlords, so to do, and order a stay of execution, upon such judgment against the casual ejector, until they shall make further order therein." [1]

By the 12th section of the same statute it is also enacted, "That every tenant, to whom any declaration in ejectment [\*228] shall be delivered, shall forthwith give notice thereof to his landlord, bailiff, or receiver, under the penalty of forfeiting the value of three years improved, or rack-rent, [1] of the premises so demised

(o) *Anon* 12 Mod. 211.

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[1] The "*Revised Statutes*" of *New York*, Part 3, Chap. 5, Tit. 7, § 17, (*Vol. 2, pp. 341 & 342.*) contain the following provision:

"§ 17. No imparlance, voucher, aid-prayer or receipt, shall be allowed; but whenever any action shall be brought against any tenant, to recover the land held by him, or the possession of such land, the landlord of such tenant, and any person having any privity of estate or interest with such tenant or with such landlord, in the premises in question, or in any part thereof, may be made defendant with such tenant in case he shall appear; or may, at his election, appear without such tenant. And in the latter case, the court may order a stay of execution upon any judgment against the tenant in possession, until the further order of the court."

[1] Demise, by lease, of certain lands, together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not demised.

The tenant fraudulently concealed a declaration in Ejectment delivered to him, and suffered judgment to go by default; the declaration in Eject-

"or holden, in the possession of such tenant, to the person of whom he holds,[1] to be recovered by action of debt, to be brought in any of His Majesty's courts of record at Westminster, or in the counties palatine of Chester, Lancaster, or Durham, respectively, or in the courts of grand sessions in Wales."

With respect to this latter section, it may be proper at once to observe, that it has been interpreted to extend only to those cases in which the ejectments are inconsistent with the landlord's title. Thus, a tenant of a mortgagor, who does not give him notice of an ejectment, brought by the mortgagee upon the forfeiture of the mortgage, is not within the penalties of the clause.(p)

The first enactment in the thirteenth section of this statute, namely, that landlords may be made defendants by joining with the tenants in possession, is decidedly only a legislative sanction of the previous uniform practice of the courts; and it is also said, by *Wilmut, J.*, in the case of *Fairclaim, d. Fowler, v. Shamtile*,(q) that landlords were permitted, before this statute, to defend ejectments without joining the tenants in possession. There is, indeed, but one case extant in which the

(p) *Buckley v. Buckley*, 1 T. R. 647.

(q) Burr. 1301.

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ment did not mention mines at all, but the sheriff, in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised by the tenant, and also of those mines in which he had only liberty to dig: *Held*, that, although the latter could not be recovered under the declaration in Ejectment, still that the tenant by his own act had estopped himself from taking that objection, and that in an action for the value of three years' improved rent under the statute of 11 G. 2. c. 19. the landlord might recover the treble rent in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig.

The improved, or rack rent, mentioned in the 11 G. 2. c. 19. s. 12. is not the rent reserved, but such a rent as the landlord and tenant might fairly agree on at the time of delivering the declaration in Ejectment, in case the premises were then to be let. *Crocker vs. Fothergill*, 2 Barnew. & Ald. Rep. 652.

[1] The "Revised Statutes" of New-York. Part 2, Chap. 1, Tit. 4, § 27, (Vol. 1, p. 748.) contain the following similar enactment:

"§ 27. Every tenant to whom a declaration in ejectment, or any other process, proceeding or notice of any proceeding, to recover the land occupied by him, or the possession thereof, shall be served, shall forthwith give notice thereof to his landlord, under the penalty of forfeiting the value of three years rent of the premises so occupied by him, which may be sued for and recovered by the landlord or person of whom such tenant holds."

contrary doctrine is maintained ;(r) and the loose notes to be found of cases previous to that decision, certainly favour Mr. J. *Wilmot's* opinion.(s) It is, therefore, probable, particularly since the \*case above alluded to happened but a few years before the [ \*229 ] statute was passed, that the practice was not clearly settled until the time of that decision, and that the statute was enacted in consequence of the inconvenience resulting therefrom.(t)

By the words of the statute, the courts can admit *landlords* only to defend, instead of tenants in possession ; and difficulties have frequently arisen, as to the meaning of the word *landlord* in the act, and as to what interest in the disputed premises, will be sufficient to entitle a person claiming title to appear and defend the action.[1]

(r) *Goodright v. Hart*, Stran. 880.

(t) *Fairclaim, d. Fowler, v. Shantille*,

(s) *Lamb v. Archer*, Comb. 208. *Anon.* Burr. 1290. 1298.

12 Mod. 211.

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[1] In Ejectment, the defendant's name will not be struck out, in order to substitute the landlord's, without the plaintiff's consent, but the landlord may be made a co-defendant. *Emlen vs. Hoops*, 3 *Serg. & R. Rep.* 130.

A motion to admit a landlord to defend in Ejectment, may be grounded on the affidavit of his agent shewing the relation of landlord and tenant between him and the tenant in possession. *Jackson ex dem. Sager & Al. vs. Stiles*, 1 *Coxen's Rep.* 134.

Where a party defends an Ejectment as landlord, and the occupiers of the premises have suffered judgment by default, he cannot object that the occupiers have not received notice to quit from the lessor of the plaintiff. *Doe ex dem. Davies vs. Creed*, *Doe dem. Davies & Cheese vs. Creed*, 5 *Bingh. Rep.* 327.

Where the lessor of the plaintiff proceeded as for a vacant possession, and obtained a regular judgment by default ; it was set aside, and the person claiming to be owner of the land, on the affidavit of merits, &c. was admitted as defendant, on payment of costs, and stipulating to admit he was in possession at the commencement of the suit. *Wood ex dem. Elmendorf vs. Wood*, 9 *Johns. Rep.* 257.

A party will not be admitted to defend on an affidavit that he claims title to the premises, and has a real and substantial defence to make. *Jackson ex dem. Winter vs. M'Evoy*, 1 *Caines' Rep.* 151.

A. leased a lot of land to B., and the lease contained a power of re-entry for the non-payment of the rent, &c. ; B. leased the same premises to C., by *parol*. A. brought an action of Ejectment for the recovery of the premises, under the 23d section of the act (*Sess. 11. Chap. 36.*) for non-payment of the rent, &c., and a judgment by default was entered, on the 27th of September, 1811, against the casual ejector, and final judg-

In the first reported case upon the construction of this section, it was holden, that it was not every person *claiming title*, who could be admitted to defend as landlord, but only he, who had been in *some degree in possession*, as receiving rent, &c.; and upon this principle, the court would not allow a devisee, claiming under one will of the testator, to defend as landlord in an ejectment, brought by a devisee claiming under another will of the same testator. (u) But this doctrine was afterwards reprobated by Lord *Mansfield*, in a case where the principles of the section were fully considered, and the decisions, anterior to the act, investigated and explained.

“There are, (says Lord *Mansfield*,) two matters to be considered: First, whether the term ‘*landlord*’ ought not, as to this purpose, to *extend*

(u) *Roe, d. Leak, v. Doe*, Barn. 198.

ment entered on 23d of *December*, 1811, and a writ of possession thereon executed before *January* term, 1812. *B.* was not informed of the proceedings in the Ejectment suit, until the 27th of *May*, 1812, and in *August* following, applied to set aside the default and subsequent proceedings, and to be let in to defend as landlord; and it appearing, that *B.* had been discharged under the insolvent act, in *September*, 1811, it was *Held*, that he had no further right, as landlord, to come in and defend; and that, though he had afterwards, on the 27th of *May*, 1811, purchased the premises at the sheriff’s sale under an execution on a judgment against him, he could not, in the new character of purchaser, be let in, so long after a regular execution of the judgment in ejectment. *Jackson ex dem. Vanderwerker vs. Stiles*, 10 *Johns. Rep.* 67.

If a person be admitted to defend, on payment of costs, and after entering into the consent rule, keep out of the way, to avoid being served with a copy of the *Ca. Sa.* against the casual ejector, a rule will be granted to show cause why an attachment should not issue against him; and that service of the rule at the defendant’s house shall be sufficient. *Jackson ex dem. Jackway vs. Stiles*, 2 *Caines’ Rep.* 368.

A mortgagee in possession may be let in to defend in an action of Ejectment. *Jackson ex dem. — vs. Stiles*, 11 *Johns. Rep.* 407.

A plaintiff in an action of Ejectment brought under the 88th section of the judiciary act, [*Vermont*,] is not obliged to join a landlord with the tenant in possession, who holds by parol lease or by written lease, unrecorded, unless it can be proved that the plaintiff had knowledge of the existence of such lease. *Wallace vs. Farnsworth*, 2 *Tyler’s Rep.* 294.

The landlord will not be permitted to defend alone in Ejectment, until the tenant first neglect or refuse to appear, which should be stated in the affidavit for the motion. *Jackson ex dem. Thompson vs. Stiles*, 1 *Cowen’s Rep.* 134.

Where the landlord is admitted to defend alone, judgment may be signed against the casual ejector. *Ibid.*

to every person whose title is connected to, and consistent with, the possession of the occupier, and divested or disturbed by any claim adverse to \*such possession, as in the case of remainders or reversions, expectant upon particular estates; secondly, whether it does not extend, as between two persons claiming to be landlords *du jure*, in right of representation to a landlord *de facto*, so as to prevent either from recovering by collusion with the occupier, without a fair trial with the other. Where a person claims in opposition to the title of the tenant in possession, (v) he can in no light be considered as a landlord; and it would be unjust to the tenant, to make him a co-defendant: their defences might clash.[1] Whereas, when there is a *privity* between them, their defence must be upon the same bottom, and letting in the person behind, can only operate to prevent treachery and collusion.[2] It is no answer, "that any person affected by the judgment may bring a new ejectment;" because there is a great difference between being plaintiff, or defendant, in ejectment. (w)

(v) *Driver, d. Oxendon, v. Lawrence*, W. Blk. 1259.

(w) *Fairclaim, d. Fowler, v. Shamille*, Barr. 1290. 1294. The principles laid down by Lord Kenyon, C. J., in the case of *Love-lock, d. Norris, v. Dancaster*, (3 T. R. 783,) seem to support the doctrine of Lord Mans-

field, above mentioned; although, from the omission, in the report of the case, of the facts upon which Lord Kenyon's judgment was founded, the point cannot be clearly ascertained.

It was moved, that the *cestui que trust* might be made defendant in ejectment instead

[1] A person claiming to be let in to defend in Ejectment, must show that his title is connected to and consistent with the possession of the occupant. *Troublesome ex dem. Dougherty vs. Estill*, 1 *Bibb's Rep.* 128.

In Ejectment, a landlord proving that the tenant entered on the land under him, will be permitted to defend the action, although it appears that the tenant has been found guilty of a forcible detainer against the landlord. *McClelland vs. Doe ex dem. Sprigg*, 3 *Bibb's Rep.* 266.

One claiming in opposition to the title of the tenant, is not entitled to be admitted defendant in Ejectment with the tenant. *Jackson ex dem. Walker vs. Flint* 2 *Cowen's Rep.* 594.

Nor, *Semb.* is he entitled to be admitted a co-defendant with the landlord of the tenant, though he claim as tenant in common with such landlord, who is willing and requesting to have him joined as defendant. *Ibid.*

[2] The tenants in possession are the proper, if not the natural defendants to an Ejectment; although the landlord has a right to be made a defendant, to prevent his being injured by a combination between the lessor of the plaintiff and his tenant; but, he may waive his right, or having asserted it, may relinquish it by consent of the lessor of the plaintiff. *Herbert vs. Alexander*, 2 *Call's Rep.* 498.

[\*231] \*The judgment in this case was not, indeed, ultimately given upon these points; but the principle upon which the statute is to be interpreted, seems to have been established by it; and we may now consider, that the word *landlord* is extended to all persons claiming title, consistent with the possession of the occupier;[1] and

of the tenant, and objected to on the opposite side, because he had never been in possession, and could not be considered as a *landlord* under the statute 11 Geo. II. c. 19. s. 13

Lord *Kenyon*, C. J., "If the person requiring to be made a defendant under the act had stood in the situation of immediate heir to the person last seised, or had been in the relation of remainderman, under the same title

as the original landlord, I am of opinion that he might have been permitted to defend as a landlord, by virtue of the directions of the statute; but here the very question in dispute between the adverse party and himself is, whether he is entitled to be landlord or not; and, therefore, we are not authorised to extend the provision of the statute to such a case as this." The rule was discharged.

[1] Every person may be considered as a landlord, for the purpose of being admitted to defend in Ejectment, "whose title is connected to, and consistent with the possession of the occupier." *Stiles* ads. *Jackson ex dem. Ten Eyck*, 1 *Wend. Rep.* 316.

A person may be admitted to defend as landlord, between whom and the defendant a privity of interest exists, although he do not receive rents, which is not the true test. *Wisner & Al. vs. Wilcocks & Al.* 1 *Coleman's Cas.* 56.

So, the Assignee of a mortgagee may be let in to defend. *Jackson ex dem. Clark vs. Babcock*, 17 *Johns. Rep.* 112.

When the landlord unites with the tenant in defending the suit in Ejectment, it is sufficient to prove the tenant to have been in possession at the commencement of the suit, and his possession is deemed to be the possession of the landlord. *Jackson ex dem. Wood vs. Harrow*, 11 *Johns. Rep.* 434.

A copy of the rule of court, certified by the clerk, is sufficient evidence that the landlord was admitted to defend. *Jackson ex dem. Wood vs. Harrow*, 11 *Johns. Rep.* 436.

The admission of a party claiming right to defend in Ejectment as landlord, under the ninth section of the act of the 21st March, 1772, [*Pennsylvania*,] is an act of the court, whose duty it is to enquire before making the order, whether the applicant really stands in the relation of landlord, or whether his claim of title is consistent with the possession of the occupier. *MClay vs. Benedict*, 1 *Rawle's Rep.* 424.

Where the lessor of the plaintiff claims to recover no more than the interest of the tenant in the premises, subject to the rights of the landlord; or "claims nothing inconsistent with the rights of the landlord," the landlord will not be let in, for "he has no interest to defend." *Stiles* ads. *Jackson ex dem. Wood*, 1 *Wend. Rep.* 103.

But, "when the lessor in Ejectment claims an interest inconsistent with the title of the landlord, the latter may defend." *Stiles* ads. *Jackson ex dem. Ten Eyck*, 1 *Wend. Rep.* 317.

Persons cannot be admitted defendants after their agent whom they permitted to defend for them, has been admitted and confessed a judgment. *Bonta vs. Clay*, 5 *Litt. Rep.* 129.

that it is not necessary they should previously have exercised any act of ownership over the lands. Thus, the courts have permitted an heir, who had never been in possession, to defend an ejectment, where the father, under whom he claimed, had died just before, having previously obtained the same rule.(x) So a devisee in trust, not having been in possession, was permitted to defend an ejectment,(y) and a mortgagee has been made defendant with the mortgagor.(z)

If a party should be admitted to defend as landlord, whose title [ #232 ] title is inconsistent with the possession of the tenant, the lessor of the plaintiff may apply to the court, or to a judge at chambers, and have the rule discharged with costs.(a) If, however, he neglect to do so, and the party continue upon the record as defendant, such party will not be allowed to set up such inconsistent title as a defence at the trial.(b)

The Court of King's Bench, in a case which has already been frequently cited, exercised a singular species of equitable jurisdiction, with respect to the admission of a person claiming title to defend an ejectment. The action was brought by one, claiming as the heir of a copyholder; and the lord of the manor, claiming by escheat *pro defectu heredis*, obtained a rule to show cause why he should not be admitted defendant. After considerable argument as to the legality of the lord's claim to defend, it was agreed by both parties, at the recommendation of the court, that the then ejectment should be discontinued, and a fresh one brought in the lord's name, in which the heir should be admitted defendant; and Lord Mansfield, C. J., declared afterwards, that if the heir had refused to consent to this arrangement, they would have admitted the lord to defend, and that if the lord had refused his consent, they would have discharged the rule.(c)

A wife has been permitted to defend an ejectment, where the title of the plaintiff's lessor arose from a pretended intermarriage with her, which marriage she disputed.(d)

(x) *Doe, d. Heblethwaite, v. Roe*, cited 3 T. R. 788.

(y) *Lovelock, d. Norris, v. Lancaster*, 4 T. R. 122.

(z) *Doe, d. Tilyard, v. Cooper*, 3 T. R. 645. It does not appear, from the report of this case, whether the mortgagee had previously received any rent; but, from the prin-

ciples above, laid down, the circumstances seem immaterial. (*Sed vide* B. N. P. 95.)

(a) *Doe, d. Harwood, v. Lippencott*.—*Coram Wood*, B. Trin. Vac. 1817. MS.

(b) *Doe, d. Knight, v. Lady Smythe*, 4 M. & S. 347.

(c) *Fairclain d. Fowler, v. Shentille*, Burr. 1290.

(d) *Fenwick v. Gravenor*, 7 Mod., 71.



[ \*233 ] \*But a parson claiming a right to enter, and perform divine service, has been held not to have a sufficient title to be admitted defendant; (e) and, where the application for admission appeared only a device to put off the trial, the Court refused to grant a rule. (f)

It may be useful to observe, that it is not necessary for the landlord to be made defendant, in order to make his title admissible in evidence; but that he may, with the tenant's consent, defend the ejectment in the tenant's name. And where a suit was so defended, and the lessor of the plaintiff, having knowledge thereof, obtained from the tenants a *retraxit* of the plea, and a *cognovit* of the action, the Court directed the judgment to be set aside. (g)

Thus far as to who may appear : we now must now consider the appearance should be made, and herein first of the Consent Rule. [1]

The form (h) and purposes of the consent rule have already been cursorily mentioned; (i) but they must now be spoken of more fully. It is in substance as follows : First, The person appearing consents to be made defendant instead of the casual ejector. Secondly, To appear at the suit of the plaintiff; and, if the proceedings are by bill, to file common bail. Thirdly, To receive a declaration in ejectment, (j) and plead not guilty. Fourthly, At the trial of the issue to confess [ \*234 ] lease, [2] entry, and ouster, and insist \*upon title only. Fifth-

(e) *Martin v. Davis*, Stran. 914. *Vid.* cont. *Hillingsworth v. Brewster*, Salk. 256

(f) *Fenwick's case*, Salk. 257.

(g) *Doe, d. Locks, v. Franklin*, 7 Taunt. 9

(h) Appendix No. 25.

(i) *Ante*, 13.

(j) The declaration, served upon the tenant to bring him into court, is the only declaration now delivered.

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[1] The "*Revised Statutes*" of New-York, Part 3, Chap. 5, Tit. 1, (Vol. 2, p. 306,) contain the following section :

"§ 24. The consent rule, heretofore used, is hereby abolished."

A consent rule in Ejectment for admitting the landlord to defend, need not set out the Christian and surname of the lessor of the plaintiff. *Doe dem. Spencer & Al. vs. Read & Al.*, 3 *Moore's Rep.* 96.

An agreement to confess lease, entry, and ouster of "all the lands described in the defendant's title papers," is not sufficient to authorize the admission of the defendant in Ejectment. *Carter's Lessee vs. Parrot*, 1 *Tenn. Rep.* 65.

[2] Confession of a lease, entry, or ouster in Ejectment, extends to an entry to complete the title to the action, but not to an entry which is re-

ly, That if at the trial the party appearing shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the costs of the *non pros*, and suffer judgment to be entered against the casual ejector. Sixthly, That if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant. Seventhly, When the landlord appears alone, that the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution be stayed until the Court shall further order.(k)

A trifling variation, with respect to the manner of describing the premises, exists in form between the consent rule of the Court of King's Bench, and of the Court of Common Pleas. The defendant, in the former court, consenting to confess lease, entry, and ouster, generally of all the premises mentioned in the declaration; but in the latter, of so much of them only as are in his own, or his under-tenant's possession.[1] The consent rules are, however, now considered as essentially the same in both courts; and it is in all cases necessary for the plaintiff's lessor to give evidence at the trial, of the possession of the defendant, or his under-

(k) Sel. N. P. 644.

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quisite to regain and revest the possession. *Holt's Lessee vs. Smith*, 1 Harr. & M'Hen. Rep. 273.

Where two defendants are sued jointly in Ejectment, they have no right to enter into separate consent rules in the name of each alone. *Jackson ex dem. Smith vs. Stiles*, 3 Cowen's Rep. 356.

In Ejectment, when the defendant has taken general defence, and entered into the common rule, he cannot confess lease, entry, and ouster, for a part only of the tenements laid in the declaration, but must confess for the whole. *Wilson's Lessee vs. Campbell*, 1 Dall. Rep. 126.

[1] The defendant entered into a special consent rule; describing particularly the premises for which he intended to defend, leaving a residue of the farm, for the recovery whereof the suit was brought, as to which neither the defendant nor any other person appeared to defend. The plaintiff on entering the rule to appear, &c. had filed the usual affidavit of service of *Narr.*, &c. on the defendant, describing him as tenant in possession of the premises, or of some part thereof. Held, that the plaintiff might proceed and perfect judgment against the casual ejector, and take possession of the residue not described in the special consent rule. *Underwood ads. Jackson ex dem. Varick*, 1 Wend. Rep. 95. SAME POINT, *Landendyck & Ux. vs. Burhans*, 11 Johns. Rep. 462.

tenants, of the premises in dispute, at the time of the commencement of the action.(1)[2]

Formerly the consent rule was drawn up in both courts, according to the present practice in the Common Pleas, or it specially described [ \*235 ] the premises defended, at the discretion of the defendant. Evidence of the possession of the tenant was then held necessary in the former case, but not in the latter; and so different were the principles upon which the courts then acted in regard to this action, from those by which they are now governed, that, by a rule of the court of King's Bench, in the time of Charles II.,(m) the defendant, in case the consent rule were drawn up generally, was obliged to give the lessor of the plaintiff notice in writing of the particular premises for

(1) *Goodright, d. Balah, v. Rich*, 7 T. R. 327.

(m) *Trin. Term*. 15 Car. II.

[2] But it appears, by the following General Rule, adopted at *Mich. Term*, 1820, (4 *Barnew. & Ald. Rep.* 196,) that a contrary doctrine is now held in the Court of King's Bench.

"Whereas by the common consent rule in actions of ejectment, the defendant is required to confess lease, entry, and ouster, and insist upon his title only: and whereas, in many instances of late years, defendants in ejectment have put the plaintiff, after the title of the lessor of the plaintiff has been established, to give evidence that such defendant was in possession (at the time the ejectment was brought) of the premises mentioned in the ejectment, and for want of such proof have caused such plaintiffs to be nonsuited: and whereas such practice is contrary to the true intent and meaning of such consent rule, and of the provisions therein contained for the defendant's insisting upon the title only: it is therefore ordered, that from henceforth in every action of ejectment, the defendant shall specify in the consent rule, for what premises he intends to defend, and shall consent in such rule to confess upon the trial, that the defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of service of the declaration, in the possession of such premises; and that if upon the trial the defendant shall not confess such possession as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said defendant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff, in that case to be taxed." *By the Court*.

The lessor of the plaintiff in Ejectment is bound to prove the defendant in possession of the land sued for, although the latter have entered into the general consent rule. *Alberton vs. Heirs of Redding*, 1 *Nor. Car. Law Repos.* 274.

The plaintiff in Ejectment must, at the trial, prove the defendant in possession of the premises in question, or he cannot recover. *Jackson ex dem. Roberts vs. Ives*, 9 *Cowen's Rep.* 661.

which he meant to defend, in order to release the lessor from the proof of the defendant's possession. This practice was, indeed, soon discontinued, and it became customary in lieu thereof, to insert in the margin of the consent rule, the particular premises for which the defendant appeared, which was then supposed to supersede the necessity of any proof of possession; but this marginal insertion has also now degenerated into a mere form, and since the cases of *Goodright*, d. *Balsh*, v. *Rich*, in the King's Bench,<sup>(n)</sup> and *Fenn*, d. *Blanchard*, v. *Wood*, in the Common Pleas,<sup>(o)</sup> by which cases it has been decided in both courts upon principles the most correct, that evidence must in all cases be given of the possession of the defendant, or such of his under tenants as have declarations in ejectment served upon them, the distinctions between appearing for part, or appearing for the whole, or generally, or specially, describing the premises in the consent rule, no longer prevail.

The general consent rule will, in all cases, be sufficient to prevent a nonsuit for want of a real lease, entry, and ouster, except when it is necessary that an actual entry,<sup>(p)</sup> should be made upon the land previously to the commence-<sup>\*</sup>ment of the suit. When, there- [ \*236 ] fore, an ejectment is brought by a joint tenant, parcener, or tenant in common,[1] against his companion, (to support which an *actual ouster*(<sup>q</sup>) is necessary,) the defendant ought to apply to the court upon

(n) 7 T. R. 327.

(p) *Ante*, chap. 4.

(o) 1 B. & P. 573.

(q) *Ante*, 56.

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[1] An affidavit that the tenant "claims as tenant in common with the lessors of the plaintiff; and that as he is advised by counsel and believes, "he is tenant in common" with them, is sufficient to entitle him to enter into the consent rule specially. *Jackson ex dem. Farmers' Turnpike Co. vs. Stiles*, 6 Cowen's Rep. 391, & *Vide Jackson ex dem. Loomis vs. Stiles*, 2 Cowen's Rep. 585.

But an affidavit "that, as he this deponent, verily believes, this Ejectment will involve a question between tenants in common;" is not sufficient. *Jackson ex dem. Loomis vs. Stiles*, 2 Cowen's Rep. 585.

To obtain leave to enter into the consent rule specially, the defendant in Ejectment must apply to the court, and is, therefore, entitled to have the costs of such application taxed in his final bill of costs, if he be successful. *Jackson ex dem. Prindle vs. Lytle*, 4 Cowen's Rep. 16.

The lessor of the plaintiff in Ejectment, is not bound, of course, to enter into a special consent rule, but only on application to the court. *Jackson ex dem. Prindle vs. Stiles*, 2 Cowen's Rep. 442.

affidavit,(r) for leave to enter into a special rule, requiring him to confess lease and entry at the trial, but not ouster also, unless an actual ouster of the plaintiff's lessor by him, the defendant, should be proved ;[2] and this special rule will always be granted,(s) unless it appear that the claimant has been actually obstructed in his occupation.(t)

As the consent rule contains conditions to be observed on the part of the claimant, as well as of the tenant, the claimant is obliged to join in it: and an attachment will lie against either party for disobedience of this, as of every other rule of court.

It may here be observed, that when several tenants are in posses-

(r) Appendix, No. 26.

(s) Appendix, No. 27, 28.

(t) *Anon.* 7 Mod. 39. *Oates, d. Wigfall,*

*v. Brydon, Barr.* 1805—*Doe, d. Gigner, v. Roe*, 2 Taunt. 397.

[2] The "*Revised Statutes*," Part 3, Chap. 5, Tit. 1, (*Vol. 2, pp. 306, 307.*) contain the following sections:

"§ 26. It shall not be necessary on the trial, for the defendant to confess, nor for the plaintiff to prove, lease, entry and ouster, or either of them, except as provided in the next section; but this section shall not be construed to impair, nor in any way to affect, any of the rules of evidence now in force, in regard to the maintenance and defence of the action.

"§ 27. If the action be brought by one or more tenants in common, or joint tenants, against their co-tenants, the plaintiff, in addition to all other evidence which he may be bound to give, shall be required to prove on the trial of the cause, that the defendant actually ousted such plaintiff, or did some other act amounting to a total denial of his right as such co-tenant."

If the defendant claim title as tenant in common, he ought to enter into the consent rule specially; otherwise, if he enters into the usual consent rule, he cannot object that no actual ouster was proved at the trial. *Jackson ex dem. Denniston & Al. vs. Denniston*, 4 Johns. Rep. 311.

In an action of Ejectment by one tenant in common, who has not been ousted, against his co-tenant, the latter may enter into the consent rule, where he does not dispute the title; as to part of the premises only, and the plaintiff may take judgment as to the residue, by default, and recover the *meane* profits thereof from his co-tenant. *Langendyck & Ux. vs. Burhans*, 11 Johns. Rep. 461.

It seems, that in such case, where the title is not denied, the tenant need not stipulate to confess ouster. *Ibid.*

Where the defendant in Ejectment means to defend as a tenant in common with the lessors of the plaintiff, on the ground, that there has been no ouster of the co-tenants, he should apply to the court, on affidavit, for leave to enter into the consent rule specially, stipulating to confess lease and entry only, not ouster unless an actual ouster of the lessors should be proved at the trial. *Jackson ex dem. Jones vs. Lyons*, 18 Johns. Rep. 398.

sion,[3] to whom the claimant delivers declarations for different premises, the Court will not join them in one action, on the motion of either party, although the claimant has but one title to all the lands; for, if the motion be made on the part of the plaintiff, the Court will object, that each defendant must have a remedy for his costs, which he could not have if all were joined in one declaration, and the plaintiff prevailed only against one of them; and if it be made on the part of the defendants, that the lessor might \*have sued them at different [ \*237 ] times, and it would be obliging him to go on against all, when perhaps he might be ready against some of them only.(u) But where several ejectments, are brought for the *same premises*, upon the *same demise*, the Court, on motion, or a judge at his chambers, will order them to be consolidated;(v) and although, where the premises are different, the Court will not consolidate the actions, yet, in a modern case, where, on a rule to show cause why the proceedings in all the cases (which were thirty-seven in number, and brought against the several inhabitants of the houses in Sackville-street) should not be stayed, and abide the event of a special verdict in one of them, as they all depended upon the same title, Lord *Keuyon*, C. J. said, it was a scandalous proceeding on the part of the claimant; and the rule was made absolute.(w)[1]

(\*) *Medlicot, v. Brewster*, 2 Keb. 524.  
*Smith v. Crabb*, Stran. 1140.

*ers*, Barn. 176. *Ree, d. Burlton, v. Roe*, 7 T. R. 477.

(v) *Grimstone, d. Lord Bowers, v. Burgh-*

(w) 2 Sell. Prac. 144.

[3] In Ejectment against several defendants, though they sever in their pleadings, and enter into separate consent rules, the notices and pleadings must be entitled against all, as at the commencement, but each party must be served with a separate notice, &c. *Jackson ex dem. Jauncey vs. Cooper*, 1 *Caines' Rep.* 19.

Though a plaintiff in Ejectment cannot compel two defendants, having several interests, to submit to a joint trial, yet they may conclude themselves, by a joint appearance and plea. *Lessee of Burkhart & Al. vs. Row & Al.* 4 *Yeates' Rep.* 272.

[1] In the cases of *Jackson ex dem. Pioneer & Others vs. Schaubert, & The Same ex dem. The Same vs. different Defendants in 10 other Cases*, (4 *Cowen's Rep.* 78, 79,) The COURT said: "Where a number of causes are brought and all depend upon the same title. as here, and the questions to be litigated, and the evidence, are the same in all, it is competent for either party to make an application to this court, before the circuit arrives, that only one of the causes be carried down to trial; and that the plaintiff be not prejudiced by his omission to try others; and, in a clear case, that they abide the event of the cause to be tried. In

When the tenant intends to apply to be made defendant, his attorney must procure a blank form of a consent rule, and entitle it in the margin with the names of the plaintiff and casual ejector, inserting also therein, the premises as described in the declaration, or such part of them as he would wish to defend, and stating in the body the consent of both parties, that the tenant be made defendant. He must then sign his name to this paper, which is called the agreement for the consent

"passing upon such a motion, the court would be guided by the admissions of the party against whom the motion should be made. If the affidavits of the parties should agree that the points of inquiry and the evidence would be the same in all the causes, the motion would be granted. If they should disagree, though they should only leave the matter in doubt, the motion would be denied."

In the cases of *Jackson ex dem. Swartwout & Wife vs. Stiles, Chamberlin, Tenant*, and *The Same ex dem. The Same vs. The Same*, in five other *Actions of Ejectment, against different Tenants*. (5 Cowen's Rep. 282.)

*J. Seelye*, (on behalf of the tenants,) moved to consolidate these causes on an affidavit made by the partner of the attorney for the tenants, "that he was well acquainted with the titles of both parties, &c., that he was informed and believed, and had good reason to believe, that the lessors had caused these actions to be brought on the same ground, and the same title which they set up in *Jackson ex dem. Swartwout & Wife v. Johnson*, [Decided in favour of the plaintiff, 5 Cowen's Rep. 74.] that the plaintiff's title in all these causes is the same, and derived from the same source; and that the plaintiff's evidence on the trial would be substantially the same in each. That, as he was informed and believed, the tenants all claimed title from the same source; and that the same evidence would be adduced by all the tenants, on the trial, varying only, in the manner of conveying down the title to them. That the venues were all laid in the county of *Otsego*; and the demises all laid on the same day. That he verily believed that a trial in one would settle the plaintiff's rights in all the other causes."

The motion was founded on the authority of *Jackson vs. Schaubert*, (4 Cowen's Rep. 78;) and,

*J. O. Morse*, and *D. Cady*, CONTRA, agreed that within the case cited, one of these causes should determine the whole; and the only question was, whether the court would designate the cause to be tried; or the attorney for the plaintiff should elect on noticing for trial.

*Seelye* insisted that the court should name the cause in the rule.

*Cady* said, this would be unsafe; for the defendant might die before the notice of trial served; and the cause thus be abated. The COURT made the following Rule.

"That all the causes abide the event and final determination of the one which the plaintiff may elect to notice for trial; and that whatever judgment may finally be rendered in the cause thus noticed for trial, shall be entered in all the other causes; and the party prevailing shall be at liberty to make up and file records therein accordingly."

rule,(x) and leave the same at one of the judge's chambers, when the proceedings are in the King's Bench, or with the prothonotary when in the Common Pleas, (where it will also receive the signature of the attorney of the lessor of the plaintiff,) together with a plea of the general issue. Common bail is then entered \*for the tenant, [ \*238 ] if the proceedings are by bill, or the usual appearance, if by original; and the suit proceeds in his name, instead of that of the casual ejector.(y)

When the landlord and tenant appear jointly, or the landlord appears alone, the same forms are observed, *mutatis mutandis*, together with the addition of counsel's signature to a motion (which is a motion of course, and must be annexed to the consent rule) to admit the landlord and tenant, or landlord only, to defend: accompanied also, when the landlord appears alone, with an affidavit of the tenant's refusal to appear.(z)[1]

When the party who wishes to be made defendant is not the tenant, or *actual* landlord, but *has some interest to sustain*, the Court must be moved, on an affidavit of the facts, to permit him to defend with or without the tenant, as the case may require.[2]

(x) Appendix, No. 24.  
(y) 2 Sell. Prac. 192.

(z) *Hobson, & Bigland, v. Dobson*, 1 Barn. 179. 2 Sell. Prac. 102.—Appendix, No. 29.

[1] In Ejectment the landlord may move to defend at the term when the declaration is returnable; he need not wait till a default is entered against him; if the defendant expressly refuse to appear, it is enough. *Jackson ex dem. Rugbee & Al. vs. Stiles*, 6 Cowen's Rep. 569.

The affidavit on which to move that the landlord defend in Ejectment, should shew the relation of landlord and tenant. That the tenant claims no interest except as tenant to the landlord, is not sufficient. *Jackson ex dem. Brinckerhoff vs. Stiles*, 6 Cowen's Rep. 594.

[2] On motion to be received to defend as landlord in Ejectment; it is competent for the plaintiff to show that the landlord had, after the lease, conveyed away all his interest in the premises in question. *Jackson ex dem. Howland vs. Stiles*, 5 Cowen's Rep. 447.

A. leased a lot of land to B., and the lease contained a power of re-entry for non-payment of the rent, &c. B. leased the same premises to C. by *parol*. A. brought an action of Ejectment for the recovery of the premises, under the 23d section of the act, (Sess. 11. c. 36.) for non-payment of the rent, &c. and a judgment by default was entered on the 27th of September, 1811, against the casual ejector, and final judgment entered on the 23d of December, 1811, and a writ of possession thereon executed before January term, 1812. B. was not informed of the proceedings in the Ejectment suit, until the 27th of May, 1812, and in August following appealed to set aside the default and subsequent proceedings, and to be let



If the tenant refuse to appear, the landlord cannot appear in his name, nor appoint an attorney to do so for him, and an irregular appearance of this sort will be ordered to be withdrawn.(a)

When it happens that the lessor of the plaintiff claims lands in the possession of different persons, and one of the tenants would be a material witness for the others, such tenant should suffer judgment to go by default, as to the part in his possession; because, if he appear, and be made a defendant, he becomes a party to the suit, and [ \*239 ] consequently cannot be a witness therein; and it seems, that if he appear and plead, the Court will not afterwards strike out his name upon motion.(b)[1]

When the landlord is admitted to defend without the tenant, judgment must be signed against the casual ejector, according to the conditions of the consent rule. The reason for this practice is, to enable the claimant to obtain possession of the premises, in case the verdict be in his favour; because, as the landlord is not in possession, no writ of possession could issue upon a judgment against him

The motion to admit the landlord to be defendant, instead of the tenant, ought regularly to be made before judgment is signed against the casual ejector, by the opposite party;[2] and if it be delayed until after

(a) *Roe, d. Cook, v. Doe*, Bar. 39. 178.

(b) B. N. P. 98.

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in to defend as landlord; and it appearing that *B.* had been discharged under the insolvent act, in *September*, 1811; it was *Held*, that he had no further right as *Landlord*, to come in and defend; and that, though he had, afterwards, on the 27th of *May*, 1812, purchased the premises at sheriff's sale under an execution on a judgment against him, he will not in the new character of purchaser, be let in, so long after a regular execution of the judgment in Ejectment. *Jackson ex dem. Vanderwerker vs. Stiles*, 10 *Johns. Rep.* 67.

[1] Defendants in Ejectment after they have taken a joint defence, are not permitted at the trial to sever their defence. *Carrol & Al. vs. Norwood*, 1 *Harr. & Johns. Rep.* 182.

After several persons, who have been jointly tried in Ejectment, have entered into the common rule and pleaded jointly, they cannot avail themselves of the circumstance of their tenants in severalty of distinct parcels of land. *Abney & Al. vs. Barnett*, 1 *Marsh. Rep. (Ky.)* 107.

[2] After a judgment by default against the casual ejector, the landlord may be let in to appear and defend. *Jackson ex dem. Cantine vs. Stiles*, 4 *Johns. Rep.* 493.

Where, in Ejectment, a person obtains a rule to defend as landlord, the

that time, the Court will grant the motion or not, at their discretion.(c) Thus, where a judgment against the casual ejector was signed, and a writ of possession executed thereon, and it appeared, upon motion, that the landlord's delay in his application arose from the tenant's negligence, in not giving him due notice of the service of the declaration, according to the provisions of the statute 11 Geo. II. c. 19. s. 12., the Court ordered the judgment and execution to be set aside, compelled the tenant to pay all the costs, and permitted the landlord to be made defendant on the usual terms; notwithstanding it was strongly argued by the opposite \*party, that the judgment was perfectly regular, and [ \*240 ] that the tenant's negligence was entirely a matter between him and his landlord, for which the statute had given the landlord ample compensation.(d) But in a recent case, the Court of Common Pleas, after a recovery in an undefended ejectment, without collusion, and after the lessor of the plaintiff had contracted for the sale of part of the premises, and let the purchaser into possession, refused to set aside the judgment, and writ of possession upon an application of this nature, and assigned as their reason, that the concealment of the delivery of the declaration was a matter between the tenant and his landlord, with which the plaintiff's lessor had no concern.(e) And, in another case, where the landlord applied to be made defendant, after judgment had been signed, but before execution, and the claimant offered to waive his judgment, if the landlord, who resided in Jamaica, would give security for the costs, to which offer the landlord's counsel would not accede, the Court refused the application, and permitted the plaintiff's lessor to take out execution.(f)

The appearance should, in all cases, be entered of the term mentioned in the notice, unless it be a country cause, and the notice be to appear in a *non-issuable* term, and then the appearance must be of the next *issuable* term; and where the notice was to appear in Hilary term, and the tenant entered an appearance in Michaelmas term, and did nothing

(c) *Dobbs v. Passer*, Stran 975.

(e) *Goodtitle v. Badtittle*, 4 Taunt. 820.

(d) *Doe, d. Troughton v. Roe*, Burr. 1906.

(f) *Roe, d. Hyde, v. Doe*, Barn. 188.

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plaintiff nevertheless may sign judgment against the casual ejector, but may not take out execution without further order: *Held*, that after verdict and judgment against the landlord, execution may be issued against him without any further order of the court. *Doe ex dem. Lucy vs. Bennet*, 4 Barnew. & Cress. Rep. 897.

farther, and the plaintiff's lessor, finding no appearance of Hilary term, signed judgment against the casual ejector, the Court held the [ \*241 ] judgment regular, but \*afterwards set it aside upon payment of costs, to try the merits.(g)

The party, intending to defend the action, having appeared according to the forms above mentioned, the lessor's duty in consequence thereof, must be our next consideration.

When the time for appearance has expired, the lessor's attorney must search at the proper offices for the agreement before mentioned on the part of the defendant, to enter into the consent rule; and, having signed his name on it, above that of the defendant's attorney, and also (when the proceedings are in the King's Bench) obtained the signature of the judge, at whose chambers the agreement was left, he must take it to the clerk of the rules, or secondary, who will file it, and draw up the consent rule thereupon:(h) which consent rule is, in truth, a copy of the agreement, prefixing only the date of drawing it up, omitting the premises in the margin, and adding "by the Court," instead of the attornies' names, at the end.

The plea of the general issue, we have before observed, is generally left by the defendant with the agreement for the consent rule; and when this is the case, as soon as the consent rule is drawn out, the issue is at once made up, with a copy of the rule annexed, and delivered to the defendant's attorney, with notice of trial as in other actions. [ \*242 ] \*But if the plea be not left with the consent rule,(i) the plaintiff must give a rule to plead, and then judgment may be entered for want of a plea,[1] as in other actions without a special motion in court for the purpose.(j)

(g) *Mason, d. Kendall, v. Hodgson*, Barn. 250.

(h) Appendix, No. 25.

(i) Where the plea was entitled with the true name of the cause, but, by mistake in the body of the plea, the name of the lessor was inserted as the person complaining, instead of that of the plaintiff, and the lessor's

attorney, looking upon this plea as null and void, signed judgment against the casual ejector; the judgment was set aside, with costs, as irregular, for the plea was properly entitled, and not a nullity. *Goodtitle v. Badtittle*, Barn. 191.

(j) Reg. Hil. 1649, and Trin. 18 Car. II. B. R.

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[1] After entering into the consent rule in Ejectment, the plaintiff must, before he can enter a default, serve a new or altered declaration. *Jackson ex dem. Wood & Al. vs. Wood & Al.* 6 Cowen's Rep. 586.

## OF THE PLEA, AND ISSUE.[2]

The tenant must plead at the time he signs the consent rule. *Jackson ex dem. Van Alen vs. Visscher*, 2 Johns. Cas. 106. SAME CASE, *Coleman's Cas.* 115.

The signing the consent rule, delivering a new declaration, putting in common bail, and filing a plea, are all simultaneous acts. *Jackson ex dem. Quackenboss vs. Woodward*, 2 Johns. Cas. 110. SAME CASE, *Coleman's Cas.* 120.

Where the defendant's attorney filed a consent rule without a plea, and after having agreed to exchange consent rules with the plaintiff's attorney at home, neglected, when called upon to plead without a rule for that purpose, and the plaintiff's attorney took judgment for default of a plea against the casual ejector : *Held*, the judgment was regular. *Den ex dem. Bray & Al. vs. Fen*, 3 Halsted's Rep. 303.

[2] The "Revised Statutes," Part 3, Chap. 5. Tit. 1. (Vol. 2, pp. 305, 306,) contain the following sections :

"§ 17. A defendant in Ejectment, may, at any time before pleading, apply to the court, or to any judge thereof in vacation, to compel the attorney for the plaintiff to produce to such court or officer, his authority for commencing the action in the name of any plaintiff therein.

"§ 18. Such application shall be accompanied by an affidavit of the defendant, that he has not been served with proof in any way, of the authority of the attorney to use the names of the plaintiffs stated in the declaration.

"§ 19. Upon such application, the court or officer shall grant an order requiring the production of such authority, and shall stay all proceedings in the action, until the same be produced.

"§ 20. Any written request of such plaintiff or his agent, to commence such action, or any written recognition of the authority of the attorney to commence the same, duly proved by the affidavit of such attorney or other competent witness, shall be sufficient presumptive evidence of such authority.

"§ 21. If it shall appear, that previous to such application by any defendant, he was served with a copy of the affidavit of the plaintiff's attorney, showing his authority to bring such action, such application shall be dismissed, and such defendant shall be liable for the costs of resisting such application ; the payment of which may be compelled by attachment as in other cases, which may be issued upon proof of disobedience to the order of the court or officer directing the payment of such costs.

"§ 22. The defendant may demur to the declaration as in personal actions ; or he shall plead the general issue only, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in the declaration ; and the filing and service of such plea or demurrer, shall be deemed an appearance in the cause. And upon such plea, the defendant may give the same matter in evidence, and the same proceedings shall be had, as upon the plea of not guilty in the present action of Ejectment, except as herein otherwise provided.

"§ 23. Upon such plea, the defendant may give in evidence any matter which if pleaded in the present writ of right or action of dower, would bar the action of the plaintiff."

The general issue in this action is, *not guilty* ;(k) and it seldom happens, by reason of the consent rule, that the defendant can plead any other plea. It is not, indeed, easy to imagine a case in which any other plea in bar can be necessary ; for as the claimant must, in the first instance, prove his right to the possession, whatever operates as a bar to that right, as a fine with non-claim,[3] the statute of limitations, a descent cast, &c. must cause him to fail in proving his possessory title, and consequently entitle the defendant to a verdict upon the general issue.(l)[4] As, however, the consent rule was introduced for [ \*243 ] the purposes of \*justice, the courts would undoubtedly permit the defendant to plead specially, if the particular circumstances of the case should require it.(m)

[ (k) Appendix, No. 30.

(l) In the time of Lord Coke, (*Peyton's case*, 9 Co. 77.,) an accord with satisfaction was held to be a good plea in ejectment, " because an ejectment is an action of trespass in its nature, and in trespass accord is a good

plea;" but as this plea is quite inapplicable to the modern uses of the action, the Court, it is conceived would not at this time allow a defendant to plead it

(m) *Phillips v. Bury*, Carth. 180.

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[3] A defendant in Ejectment will not be allowed to confine his defence to that part of the premises of which the plaintiff can prove him to be in possession. *Carter vs. Branch*, 1 Hayw. Rep. 135.

The defendant in Ejectment cannot avail himself of his possession anterior to the date of the plaintiff's patent. *Chiles vs. Chalk*, 4 Bibb's Rep. 554.

A fine was levied by A. in Hilary term, 1821. A. and B. claimed to be heir at law of C. There being several actions depending to try whether A. or B. was heir at law, it was agreed that the rent should be paid into a banker's to abide the event of one of those causes. The cause was decided in favour of A. in 1823, and the rent paid into the banker's was then paid over to him. It included half a year's rent due from the tenant on the 25th of March, 1821 : Held, in an Ejectment brought subsequently on the demise of B., in which he succeeded in showing that he was heir at law of C., that A. had no seisin in Hilary term, 1821, when the fine was levied, and consequently that the fine did not operate as a bar to the Ejectment. *Doe ex dem. Lidgbird vs. Lawson & Al.*, 8 Barnew. & Cress. Rep. 606.

[4] A judgment in Ejectment by default. has the same effect as a judgment upon a verdict. *Bradford vs. Bradford*, 5 Connect. Rep. 127.

Judgment for a defendant in a writ of forcible entry, &c. is no bar to the plaintiff's proceeding by Ejectment to recover possession of the same land. *Mattox, &c. vs. Helm*, 5 Litt. Rep. 185.

An Ejectment in the name of lessee, is no bar to another in a different name. *Bonta, &c. vs. Clay*, 5 Litt. Rep. 129.

A plea to the jurisdiction may be pleaded in ejectment by permission of the Court, but not otherwise. This permission is necessary, because a plea to the jurisdiction is a plea in abatement, and must, therefore, be pleaded within the four first days of the term next ensuing that of which the declaration is entitled, at which time the casual ejector, and not the tenant, is defendant. To obtain leave to plead such plea, the Court must be moved upon affidavit before the expiration of the four first days of the term, the plea itself being first filed; and the motion should be for a rule to show cause why the defendant should not be permitted to plead the facts stated in the affidavit, and why the plea then filed to that effect should not be allowed. The latter part of the rule, and the filing of the plea, are necessary parts of the application; because the four days would, in all probability, expire before cause could be shown and the plea pleaded, unless such plea were pleaded *de bene esse* in the first instance. (n)

Such, at least, has been the mode of proceeding in the only two reported cases upon the subject, which can be cited as authorities. But a practical difficulty occurs, for which these cases seem not to provide. At the time when the application for leave to plead to the jurisdiction is made, the tenant has not appeared, and the proceedings are against the casual ejector. By whom then should the plea be pleaded, and how is the tenant to appear? The most simple method [ \*244 ] of avoiding these difficulties is for the tenant, in the first instance, to file the plea in his own name, and then move for a rule to show cause "why he should not be forthwith admitted defendant upon the usual terms, except as far as relates to pleading the general issue, and why he should not be permitted to plead the facts stated in the affidavit, upon which he moves, in lieu thereof, and why the plea already filed by him to that effect should not be allowed."

Ancient demesne is a good plea in ejectment; (o) but it is a plea much discouraged, and the person pleading it must carefully observe every form which the Court deems necessary. As it is a plea in abatement, application for leave to plead it must, as has already been stated, be made within the four first days of term; and the application must be accompanied by an affidavit, that the lands are holden of a manor

(n) *Williams, d. Johnson, v. Keen, W. Blk. 197. Doe, d. Morton, v. Roe, 10 East, 522.*

(o) Appendix, No. 31, 32;

which is ancient demesne, that there is a Court of ancient demesne regularly holden, and that the claimant has a freehold interest ; and the court will refuse the motion if any of these facts be omitted in the affidavit.(p)

Ancient demesne cannot of course be pleaded where the ejectment is for copyhold lands ;(q) but if the affidavit state that the lands are ancient demesne, the court will not reject the plea upon a counter affidavit that great part of the lands are copyhold, but will leave the plaintiff to state such matter in his reply.(r)

[ \*245 ] When the party appearing has entered into the consent \*rule and pleaded, he may move for a rule to reply, before the plaintiff's lessor has joined in the consent rule, and the plaintiff may be *non-prossed* thereby ; but as the plaintiff is only a fictitious person, the defendant will not be entitled to costs.(s)[1]

The issue must agree with the declaration against the casual ejector in all respects, except in the defendant's name, unless an order for the alteration be obtained ; and if there be a difference between the issue and the declaration, the Court on motion will set it right.(t)[2]

If the party interested appear and plead, and after having pleaded

(p) *Doe, d. Rust, v. Roe*, Barr. 1046.  
(q) *Denn, d. Wroot, v. Fenn*, 8 T. R. 474.

(r) *Doyle v. Dade*, Salk. 185. S. C. Ld. Raym. 48.

(s) *Doe, d. Morton, v. Roe*, 10 East, 523.

(t) *Goodright, d. Ward, v. Badtillie*, W.

Blk. 763.

(t) *Bass v. Bradford*, Ld. Raym. 1411.

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[1] This court will not make a rule on the lessor of the plaintiff to pay costs on a judgment of nonpros against him, for refusing to join in the consent rule. *Anonymous*, 3 *Halsted's Rep.* 268.

[2] Under the acts of 21st *March*, 1806, and 13th *April*, 1807, [*Sm. Laws*, 476.] a formal joinder of issue in Ejectment is not necessary. Immediately on the plea of *not guilty* being put in issue is considered as joined. *Gallagher vs. M'Nutt*, 3 *Serg. & R. Rep.* 409.

In Ejectment the demise was laid to be by the mayor, burgesses, &c. of the borough town of *M.*, and on the trial, it turned out from the charter that the name of the corporation was, "the mayor, &c. of *M.*;" Held, that this was no variance, it appearing from the charter which was in evidence, that *M.* was a borough town. *Doe dem. Mayor, Aldermen, Capital Burgesses, and Commonalty of Malden vs. Miller*, 1 *Barnew & Ald. Rep.* 699.

withdraw his plea, the judgment must be entered against the party so appearing.[3]

The record and issue are made up with memorandums, if the proceedings are by bill; and without any memorandum, if by original, as in other actions: the time allowed for notice of trial is also the same.

A plea *puis darrein continuance* it seems may be pleaded to this action:[4] but where the plea was, that after issue joined, one of the lessors of the plaintiff had released to the de-\*fendant,[1] [ \*246 ] the Court held the plea insufficient, and said the release ought to have been by the nominal plaintiff; because, although in every other respect the Court would look upon the lessor as the interested person, as far as the record was concerned they must consider the nominal plaintiff as the real party.(u) A release by the nominal plaintiff so pleaded, would certainly, when the old practice prevailed, have been a good defence to the action; but even then the Courts held such a release to be a contempt,(v) and it is very doubtful whether a judge would receive the plea at the present day.

When the ancient practice prevailed, if the plaintiff in ejectment after

(u) *Doc, d. Byne, v. Brewer*, 4 M. & S. 300. (v) *Ante*, 181.

[3] Where the lessor of the plaintiff in Ejectment entered on the premises and possessed himself thereof, pending the suit, he was held liable to pay the costs of the suit. *Gubbs vs. Ellis*, 2 *Nor. Car. Law. Repos.* 612.

[4] Matter of defence arising after issue joined, must be pleaded *puis darrein continuance*. *Jackson ex dem. De Forrest & M'Michael vs. Ramsey*, 3 *Cowen's Rep.* 75.

This rule applies as well to Ejectment as to other actions; as where the defendant acquires title by deed after issue. *Ibid.*

But where R. purchased the premises at sheriff's sale, on a judgment and execution against M. and took no deed; and then M.'s devisee brought Ejectment, after issue joined, in which R. obtained a sheriff's deed: *Held*, that this need not be pleaded; but might be given in evidence upon the general issue. *Ibid.*

[1] The plaintiff in Ejectment cannot recover under a demise from a lessor, who has released his interest to the defendant, he being estopped by such release from claiming any title. *Jackson ex dem. Bonnell & Al. vs. Foster*, 12 *Johns. Rep.* 488.

It seems, that the defendant cannot plead a release from the lessor of the plaintiff, to defeat the action; *James Jackson* being the real plaintiff on record. *Jackson ex dem. Allen vs. Bell*, 19 *Johns. Rep.* 168.



issue joined, and before the trial, entered into any part of the premises, the defendant at the assizes might plead such entry as a plea *puis darrien continuance*. [2] But this plea cannot now be ever necessary; for the plaintiff, being a fictitious person, cannot enter upon the land; and if the lessor of the plaintiff should enter, he would be unable at the trial to prove the possession of the defendant, and must consequently fail in his ejectment. (w) [3]

(w) *Moore v. Hawkins*, Yelv. 180.

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[2] Alienage may be given in evidence under the general issue. *Jackson ex dem. Johnston & Al. vs. Decker*, 11 Johns. Rep. 418.

But where issue has been joined on the demise of an alien residing in England, claiming to hold land under the act of 2d of April, 1798, (*Sess. 21. Chap. 72.*) before the declaration of war, his alienage must be pleaded *puis darrien continuance*. *Jackson ex dem. Smith & Al. vs. M<sup>r</sup> Connell*, 11 Johns. Rep. 424.

[3] It is not cause of abatement of Ejectment that the plaintiff entered into possession of the premises pending the action. *Venner vs. Underwood*, 1 Root's Rep. 73.

## CHAPTER X.

## OF THE EVIDENCE IN THE ACTION OF EJECTMENT.

THE facts necessary to be established by a claimant in ejectment, when his title to the premises is controverted, are as follows. [1] First,

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[1] Parol declarations are inadmissible to prove or disprove title, or a disclaimer of title to lands. *Jackson ex dem. Williams & Al. vs. Miller*, 6 *Cowen's Rep.* 751.

"Acknowledgments of the party, as to title to real property, are generally a dangerous species of evidence; and though good to support a tenancy, or to satisfy doubts in cases of possession, they ought not to be received as evidence of title." *Jackson ex dem. Burr & Al. vs. Sherman*, 6 *Johns. Rep.* 21.

Parol evidence of a disclaimer of title to real property is inadmissible. *Jackson ex dem. Van Alen & Al. vs. Vosburgh*, 7 *Johns. Rep.* 186. *Jackson ex dem. Livingston vs. Kisselbrach*, 10 *Johns. Rep.* 336, 338. *Brandt ex dem. Cuyler & Al. vs. Livermore*, *ibid.* 358. *Jackson ex dem. White vs. Cary*, 16 *Johns. Rep.* 302. *Jackson ex dem. Van Schaick & Al. vs. Davis*, 5 *Cowen's Rep.* 133.

In Ejectment by a landlord against his tenant, the latter cannot show in his defence, that the landlord has acknowledged, *by parol*, that the title is in another. *Jackson ex dem. Van Schaick & Al. vs. Davis*, 5 *Cowen's Rep.* 124.

But if the tenant have actually purchased of, or attorned to another, with his landlord's consent or encouragement, this throws the burthen of proving title upon the landlord, the same, as if the action had been against a stranger holding adversely, *Ibid.*

In Ejectment the lessor of the plaintiff shall not be obliged to show his title further back than from the person last seised, first showing the estate to be out of the Commonwealth. Said by M'KEAN, Ch. J. to have been ruled by him at Lancaster. *Shirder's Lessee vs. Nargan*, 1 *Dall. Rep.* 68.

"A man sued in Ejectment may defend the suit, and nevertheless agree to purchase the title of the plaintiff, in case the plaintiff should prove successful." *Wilcox vs. Calloway*, 1 *Wash. Rep.* 38.

In an action of Ejectment, evidence cannot be introduced to prove that a patent was *irregularly* obtained. *Witherington vs. McDonald*, 1 *Hen. & Munf. Rep.* 303.

he must prove that he had the *legal* estate in the disputed lands at the

*Quere.* Whether in such case, evidence is admissible that a patent was obtained by *fraud*? *Ibid.*

Where the plaintiff had read in evidence a deed from one under whom he claimed, reciting that possession of the land in dispute had been delivered to *A.*, according to a contract, it was *Held*, that to rebut the presumption of an outstanding title in *A.* he might show that *A.* admitted he had sold to another who had sold to the plaintiff. *Lessee of Packer vs. Gonsalus*, 1 *Serg. & R. Rep.* 526.

In Ejectment the plaintiff may give in evidence that certain deeds necessary to make out his title, are in the hands of and detained by a third person, under whom the defendant claims as lessee. *Morris' Lessee vs. Vanderen*, 1 *Dall. Rep.* 65.

A decree of the court of a county, requiring a defendant residing within its limits, to execute a conveyance for lands lying in another county, can be enforced upon the person only of such defendant, and does not of itself vest any legal title in the complainant. If offered as evidence of such title in an action of Ejectment, it ought not to be received. *Aldridge & Al. vs. Giles & Al.*, 3 *Hen. & Munf. Rep.* 136.

Where the lessor of the plaintiff is a fictitious person, instead of the lessee, evidence on the part of the plaintiff not going to shew a title in the lessor, ought to be excluded. *Butts vs. Blunt & Al.*, 1 *Rand. Rep.* 255.

A lease for a year to *A.* and his wife, will support a release to *A.* and a third person. *Doe ex dem. Saunders vs. Cooper*, 1 *Holt's Rep.* 461.

A deed of conveyance under which the lessor of the plaintiff claims title in ejectment is proved to have been altered in a material part since the execution; it *seems* that the deed is still admissible in evidence. *Doe ex dem. Beanland & Al. vs. Hirst*, 3 *Starkie's Rep.* 60.

In ejectment for lands sold by a constable under the act of 30th December, 1777, [*Pennsylvania*] for not serving a tour of duty in the militia, the vendee must show the warrant of the Lieutenant to the constable, and all the other steps preliminary to the sale, as required by law. *Goodright Lessee, &c. vs. Probst*, 1 *Yeates' Rep.* 300.

In ejectment the plaintiff may give evidence to show that he articulated to sell the land to a third person, and afterwards recovered it from him in ejectment for the purpose of showing a former possession in himself. *Vanhorn vs. Frick*, 3 *Serg. & R. Rep.* 278.

A warrant was taken out and paid for by a father in the name of his sons and on ejectment brought, the question being whether the warrant was designed by the father as an advancement to his sons, or whether a trust resulted to him; it was decided that evidence might be given of acts of ownership on the land by the father, and of declarations to explain those acts, in order to rebut the presumption that the land was intended as an advancement. *Sampson vs. Sampson*, 4 *Serg. & R. Rep.* 329.

A surveyor's original book of surveys and his parol testimony, admitted by the general court, in an action of ejectment, as competent evidence to prove that a certificate of survey returned to the land office was forged. *Borcings' Lessee vs. Singery*, 2 *Har. & Johns. Rep.* 455.

time of the demise laid in the declaration; secondly, that such legal estate was accompanied by a right of entry; [2] and, thirdly, that the defendant, or those claiming under him, were in possession of the premises at the time when the declaration in ejectment was delivered. [3] When, indeed, there is a privity between the parties, as if the

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A deed of bargain and sale by a bargainor, not having actual possession of the land, nor that statutory possession, which he might acquire as bargainee from some other person having actual possession, conveys no title under which his bargainee can recover in ejectment. *Tabb vs. Baird*, 3 *Call's Rep.* 480.

A deed of bargain and sale and release of land, from a person not in possession to another in the same predicament, (the land being at the time, held by a third person with adverse title,) passes nothing; and, therefore, does not divest the bargainor of his right to recover in ejectment. *Hopkins & Al. vs. Ward & Al.*, 6 *Munf. Rep.* 38.

If a person out of possession of land held adversely, convey the same to another, the title still continues in the grantor and he may maintain ejectment. *Williams vs. Jackson ex dem. Tibbits & Al.*, (IN ERROR) 5 *Johns. Rep.* 489. *Jackson ex dem. Youngs & Al. vs. Vredenburg*, 1 *Johns. Rep.* 159.

And where, in an action of ejectment, several demises were laid, one from the grantor, and another from the grantee of such a deed, it was *Held*, that the plaintiff might recover, though he could not on the demise of the grantee only. *Williams vs. Jackson ex dem. Tibbits*, (IN ERROR) 5 *Johns. Rep.* 489.

[2] The "Revised Statutes" Part 3, Chap. 5, Tit. 1, § 3, (*Vol. 2, pp.* 303, 304,) contain the following section:

"§ 3. No person can recover in ejectment, unless he has at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial."

[3] *Vide ANTE Page 234, n. [2]*

The plaintiff is entitled to recover in Ejectment, although it appear that the defendant, who is in possession, is the mere servant of another, by whose permission he entered into possession. *Doe dem. Cuff vs. Stradling*, 2 *Starkie's Rep.* 187.

In an action of Ejectment to which the general issue is pleaded, it must appear that the defendant dispossessed the plaintiff, or was in the actual possession of the land. *Cooper vs. Smith*, 9 *Serg. & R. Rep.* 26.

The return of the sheriff under the act of assembly of April the 13th, 1807, [*Pennsylvania.*] is only *prima facie* evidence of the possession of any defendant, whether his name be in the writ of Ejectment, or be added by the sheriff; and such defendant may rebut it by showing that he was not in possession. *Ibid.*

The return of "served" by the sheriff on a writ of Ejectment, is *prima*

relationship of landlord and tenant has subsisted between them, proof of title will be unnecessary; [4] for a party will not be allowed to

*facie* evidence of possession by the defendants, whether they be originally named in the writ or added by the sheriff. *Dietrick vs Mateer*, 10 *Serg. & R. Rep.* 151.

A plaintiff in Ejectment cannot succeed, unless he prove the defendant to be in possession. *Pope vs. Pendergrast*, 1 *Marsh. Rep. (Ky.)* 122.

Land not included in the lines described in the declaration, cannot be recovered in Ejectment. *Trozler vs. Gibson*, 1 *Hayw. Rep.* 465.

Merely moving hay scales on the ground of another, and never afterwards interfering with them, does not amount to a possession in the party removing, so as to subject him to an action of Ejectment. *Jackson ex dem. Garnsey vs. Pike*, 9 *Cowen's Rep.* 69.

[4] When the relation of landlord and tenant is once established, it attaches to all who may succeed to the possession, through or under the tenant, immediately or remotely. And the succeeding tenant is as much affected by the acts and acknowledgments of his predecessor, as though they were his own. *Jackson ex dem. Van Schaick & Al. vs. Davis*, 5 *Cowen's Rep.* 123. *Jackson ex dem. Webber & Al. vs. Harsen*. 7 *Cowen's Rep.* 323.

An acknowledgment by a person, under whom the defendant in Ejectment claims to hold the land, that he went into possession under the lessors of the plaintiff, is conclusive against the defendant, as to the tenancy.—*Jackson ex dem. Vandeusen & Al. vs. Scissam*, 3 *Johns. Rep.* 499.

Though one purchase and take of a lessee, and in fact enter upon the premises under an absolute conveyance in fee, yet, in judgment of law, he enters as tenant to the lessor. *Jackson ex dem. Van Schaick & Al. vs. Davis*, 5 *Cowen's Rep.* 123.

But this rule means the conventional relation of landlord and tenant, where some rent or return is in fact reserved to the former; not a relation arising from mere operation of law; as where one makes a grant, and by the omission of the technical word *heirs*, an estate for life, only, passes. In such case, after the death of the tenant for life, an adverse possession may commence running, in favour of those who enter and claim in fee under the grantee, which, after twenty-five years, will bar all claim of the reversioner and his heirs. *Jackson ex dem. Webber & Al. vs. Harsen & Al.* 7 *Cowen's Rep.* 323.

If the defendant have recognised the lessor as his landlord, he cannot, afterwards, dispute his title. *Jackson ex dem. Low & Al. vs. Reynolds*, 1 *Caines' Rep.* 444. *Jackson ex dem. Blecker vs. Whitford*, 2 *Caines' Rep.* 215. *Jackson ex dem. Van Alen & Al. vs. Vosburgh*, 7 *Johns. Rep.* 186.

An agreement, by a person in possession of land to abandon the premises at a certain day, is not a lease, and does not estop him from controverting the title of the person with whom the agreement was made. *Miller vs. M'Brier*, 14 *Serg. & R. Rep.* 382.

R. C. and others, being tenants in common of certain lands, and R. C. having sold a part thereof to E. W. and others, a decree for partition obtained by the other tenants against R. C. in a suit commenced *subsequently*

dispute the original right of him by whom he has been admitted into

to the sale, is not evidence in their favour in an action of Ejectment brought by them against the vendees, who were no parties to the suit for partition. *Carter's Trustees vs. Washington & Al.* 2 Hen. & Munf. Rep. 345.

Evidence of an agreement for a lease, between the lessor in Ejectment and the tenant, is not sufficient to enable the plaintiff to recover the possession, when there is no proof that any lease was ever executed, or rent paid, and the tenant claims to hold adversely. *Jackson ex dem. Southampton & Ux. & Al. vs. Cooley & Johns. Cas.* 223.

He will not be permitted to show, that the land leased to him is without the bounds of the lessor's premises. *Jackson ex dem. Bleecker vs. Whitford, & Caines' Rep.* 215. SAME POINT, *Brandt ex dem. Cuyler vs. Livermore, 10 Johns. Rep.* 358.

A tenant who had been in possession under an adverse title, made application to the lessor of the plaintiff to purchase the land, and requested to be considered as his tenant: *Held*, that although this precluded the tenant from taking advantage of the Statute of Limitations, yet he might show that the application was founded in mistake, or that the fee existed in himself, or out of the lessor, but he cannot set up want of notice to quit as a defence. *Jackson ex dem. Viele & Al. vs. Cuerden, 2 Johns. Cas.* 353.

If the defendant, having originally entered under a title from A., afterwards take a release from B., he cannot, in an action of Ejectment against him by a person claiming under A., deny the title of A., and set up B.'s title as an older and better one. *Jackson ex dem. Bowne vs. Hinman, 10 Johns. Rep.* 292.

As between the landlord and tenant, the title of the former to the property leased, is not to be called in question. *William's Ex'ors. vs. The Mayor, &c. of Annapolis, 6 Harr. & Johns. Rep.* 533.

A lease, unfairly obtained from a party in possession of the land, will not prevent the Lessee from contesting the title of the lessor. *Brown vs. Dy-singer & Al., 1 Rawle's Rep.* 408.

The defendants in ejectment cannot give in evidence a record of a suit against a third person, on which the land was sold, to one under whom he claims, unless some colour of title be first shown in the person as whose property the land was sold. *Kennedy vs. Bogart & Al., 7 Serg. & R. Rep.* 97.

Where a complainant derives title under a deed conveying the whole tract patented, except parcels thereof, before conveyed to persons named, it is incumbent on him where the defendant claims adverseley to the patent, to show that the land in contest is not embraced in the exceptions. *Guthrie vs. Lewis' Devises, 1 Monroe's Rep.* 143.

Otherwise, where the defendant claims to hold under the same grantor, more especially if he claims an excepted parcel. *Ibid.* 143, 144.

A tenant holding over after a lease expired, cannot controvert his landlord's title. *Jackson ex dem. Wills & Al. vs. Stiles, 1 Cowen's Rep.* 575.

Nor if he take a lease from a third person, on being ejected, will that third person be allowed to defend as landlord. *Ibid.*

The latter claiming under the tenant has no greater right to a defence than the tenant would be entitled to. *Ibid.*

possession,(x)[5] although he is at liberty to show that such right has

(x) *Driver v. Laurence*, W Black. 1250.

Defendant enclosed a small piece of waste land by the side of a public highway, and occupied it for thirty years without paying any rent; at the expiration of that time, the owner of the adjoining land demanded *sixpence* rent, which defendant paid on three several occasions. In ejectment: *Held*; that this, in the absence of other evidence, was conclusive to show that the occupation of defendant began by permission, and entitled the plaintiff to a verdict. *Doe ex dem. Jackson vs. Wilkinson* 3 Barnew. & Cress. Rep. 413.

A tenant may impeach his landlord's title whenever he can show that he was induced to take a lease by misrepresentation and fraud. *Miller vs. M'Brier, Serg. & R. Rep.* 382.

A clear subsisting title outstanding in another, means such a title as a stranger could recover on in ejectment against either of the contending parties. *Hall vs. Gittings Jr's Lessee*, 2 Har. & Johns. Rep. 122.

A plaintiff in ejectment can never recover, unless he show in himself a right of entry; therefore it is competent to the defendant to show that the land is covered by an older patent because that disproves the plaintiff's right of entry. *Botts vs. Shield's Heirs*, 3 Litt. Rep. 35.

Acceptance of a lease for a small part of a tract of land does not estop the defendant in ejectment from controverting the plaintiff's title to the residue of the tract. *Pedrick vs. Searle*, 5 Serg. & R. Rep. 236.

[5] Where a person in possession of land, enters into a contract for the purchase of it, such act is a recognition of the Vendor's title, and precludes the purchaser from denying it; and in case of forfeiture he is a mere tenant at will, and not entitled to notice to quit; and on failure to make payments according to the terms of the contract, an action of Ejectment lies to recover the possession. *Whiteside & Al. vs. Jackson*, 1 Wend. Rep. 418.

One making a contract to buy land; and taking possession under it, though strictly, the relation of landlord and tenant is not thus created; yet the vendee in Ejectment, by the vendor, against him is absolutely estopped from either shewing title in himself, or setting up an outstanding title in another. *Jackson ex dem. Livingston vs. Walker*, 7 Cowen's Rep. 637. *Jackson ex dem. Norris & Al. vs. Smith*, *Ibid.* 717.

Unless the contract were usurious, then it seems, the tenant is not estopped. *Ibid.* 717.

Or, "unless he was in some way deceived or imposed upon in making such agreement." *Jackson ex dem. Brown & Al. vs. Ayres*, 14 Johns. Rep. 224.

So of any one coming in under him, either with his consent or as an intruder. *Jackson ex dem. Livingston vs. Walker*, 7 Cowen's Rep. 637.

And where a third person G. brought Ejectment against such a vendee, who went into another state, leaving his wife and children in possession of the premises; and G. then persuaded the wife to surrender the possession to him for a compensation, and afterwards put a tenant of his into posses-

expired.(y)[6] In cases of this nature, therefore, it will be sufficient to

(y) *England, d. Syburn, v. Slade*, 4 T. R. 682. Vide *Baker v. Mellish*, 10 Ves. Jun. 544.

sion, it was *Held* on an Ejectment brought by the vendor against G.'s tenant, that such tenant was estopped from shewing G.'s title or any title outstanding against the lessor. *Ibid.*

A defendant in Ejectment, claiming the land by executory contract of purchase from the plaintiff, will not be permitted to contest the plaintiff's title; and consequently, will not be permitted to give evidence of the existence of outstanding elder grants covering the same land. *Hamilton vs. Taylor, Litt. Select. Cas. 444.*

The acknowledgment of the defendant that he entered under such contract with the plaintiff, may be proved without producing the contract, *Ibid.*

A person who has entered into possession under another, and acknowledged his title, cannot set up an outstanding title in a third person. *Jackson ex dem. Smith & Al. vs. Stewart, 6 Johns. Rep. 34. SAME POINT. Jackson ex dem. Davie vs. De Walls, 7 Johns. Rep. 157.*

A lessor, whose property has been assigned to a provisional assignee under the insolvent debtor's act, cannot eject an occupier of lands which passed under the assignment, although the provisional assignee has never taken possession, nor any permanent assignee been appointed, nor the rent ever been withheld from the lessor. *BEST, C. J. dissentiente. Doe ex dem. Palmer vs. Andrews, 4 Bingh. Rep. 348.*

[6] "Although a tenant cannot deny the title of his landlord under which he entered, it is competent for him to show that it has terminated either by its original limitation, or by conveyance, or by the judgment and operation of law." *Jackson ex dem. Van Schaick & Al. vs. Davis, 5 Cowen's Rep. 135. (Per SUTHERLAND, J. delivering the Opinion of the Court.)*

Though the rule that a tenant is estopped to deny the title of his landlord, is an universal one, not merely technical, but founded in public convenience and sound policy; and though the person once a tenant, will, *prima facie*, be deemed to continue in that character, so long as he remains in the occupation of the land demised; yet it is competent for such person to shew, that the relation has been dissolved; and this being done, he will be permitted to controvert the title under which he formerly held. *Camp vs. Camp & Al. 5 Connect. Rep. 291.*

A defendant in Ejectment who has paid rent to the lessor of the plaintiff, may show that his landlord, pending the term, sold his interest in the premises. *Doe ex dem. Lowden vs. Watson, 2 Starkie's Rep. 204, 228.*

Where a man claiming under an executory contract is evicted and turned out of possession by a writ of *habere fucias possessionem* on an adversary claim, he may purchase in such adversary claim, and assert it in defence of a suit brought by the man from whom he first purchased. *Chiles vs. Bridges' Heirs, Litt. Select. Cas. 420.*

In such case, the record of the suit by which he was evicted, and the



prove, that the defendant, or those under whom he claims, [ \*248 ] (for the rule extends to under-tenants,(z)) were admitted into possession of the premises in question, by the lessor of the plaintiff, and that their right to the possession has ceased.[1] And upon the same principle, if the defendant has held as tenant to some third person under whom the lessor claims, although the derivative title of the claimant from such third person must be proved in addition to the evidence necessary in the last case, proof of the title of the third person himself will not be required. 2

The identity of the lands, and the possession of them by the defendant, can always be proved without difficulty, when a privity exists between the parties, by the fact of payment of rent, or by the acknowledgment of the defendant that he is tenant, &c.[2] When there is no privity, the

(z) *Barwick, d. Mayor of Richmond v. Thompson*, 7 T. R. 488.

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sheriff's return of his dispossession, are evidences of these facts, although the person from whom he purchased was no party to the suit. *Ibid.*

Nor will the circumstance of judgment having been obtained by default, prejudice the defendant, if it shall appear that the adversary claimant had the eldest patent, and that the land in question was included in it. *Ibid.*

[1] A person purchasing land under an execution is substituted in the place of the defendant; and in Ejectment by the landlord, cannot set up a title in a third person. *Jackson ex dem. Klein vs. Graham*, 3 Caines' Rep. 188.

Neither can the defendant set up a title in a third person, against the purchaser. *Ibid.*

In Ejectment by a purchaser under a *Fi. Fa.* against a person in possession under the debtor, without title or collusively, the defendant cannot set up an outstanding title in a third person. *Jackson ex dem. Masters vs. Bush*, 10 Johns. Rep. 223.

[2] Whether there be a tenancy or not, is matter of fact, and the tenant may produce parol evidence to disprove the existence of it. *Jackson ex dem. Van Alen & Al. vs. Vosburgh*, 7 Johns. Rep. 186.

In an action of Ejectment the Court has no power to compel the defendant to consent to a survey of the premises in his possession. *Jackson ex dem. Van Rensselaer & Al. vs. Hogaboom*. 9 Johns. Rep. 83.

Where the plaintiff and defendant claim under adjoining patents, the Court cannot grant a rule ordering the lessors of the plaintiff to permit a survey to be taken of the boundary line; but if it appear necessary for the defence in the suit, that it should be ascertained, they will allow a rule to stay proceedings till the lessors consent to a survey, or the judge at the circuit may postpone the cause on the same principle. *Jackson ex dem. Waggoner & Al. vs. Murphy*, 3 Caines' Rep. 82.

general mode of proof is by reading the deeds or wills under which the lessor claims, and showing that the names and abutments of lands in the defendant's possession, agree with the premises described therein; [3] or by showing that the lands in dispute were formerly in possession of the ancestors, &c. of the claimant; and the declarations of deceased tenants may be received in evidence, for the purpose of proving that any particular lands formed part of the estate they occupied. (a) Cases in which it is extremely difficult to prove identity and possession will, indeed, sometimes occur, from the deficiency of the description in the title deeds, the length of time during which the claim has lain dormant, or other causes: but these cases all depend upon their own circumstances, and it is impossible to give any general directions concerning them.

The evidence necessary to establish the other parts of \*the [ \*249 ] lessor's case will of course vary according to the nature of his claim. We shall, therefore, first consider the several proofs requisite in support of each particular title, when no privity exists between the parties; and, secondly, the proofs required when such privity does exist.

\*Before, however, we proceed in this inquiry, it will be use- [ \*250 ] ful to give a short account of the decisions respecting the competency of parties, having an interest in the lands, to give testimony concerning them. [1]

(a) *Davies, v. Pierce*, 2 T. R. 53 *Outram Finch*, 1 Taunt. 141.  
*v. Morewood*, 5 T. R. 121. *Et vide Ibat v.*

The parol declarations of one in possession of lands, as to the nature and extent of his interest, no legal title being shown in him, are admissible against him as evidence, and against those who claim under him, unless it appear that there is higher testimony as to the matter sought to be shown by parol. *Jackson ex dem. Swartwout & Uz. vs. Cole*, 4 Cowen's Rep. 587.

[3] In Ejectment a witness may be asked whether one was in possession of a tract of land, but not whether in possession of a particular part, or of a house, unless located in the plots filed in the cause. *Hawkins' Lessee vs. Middleton & Al.* 2 Har. & M'Hen. Rep. 119.

[1] Where it did not appear how long the defendant in an action of Ejectment had been in possession of the lands in dispute, a lessee of the plaintiff, under an old lease, who had probably been out of possession twenty years or more, and against whom no suit had been brought, was *Held*,

The tenant in possession is not a competent witness to support his landlord's title, inasmuch as he is interested in the event of the suit; for if the verdict be against his landlord he is liable for the mesne profits, and may also be turned out of possession : (b) nor is his evidence admissible to prove that he, and not the defendant, is really the tenant; [2] for a verdict against such defendant would have the effect of ejecting him (the witness) from the lands, which is an immediate interest, and outweighs the contrary and remoter effect of subjecting himself, by his testimony, to a future action. (c) Upon the principle of interest, also, the person having the inheritance of the lands is not an admissible witness, where two persons, both of whom admit his title, are contending for the possession under different grants from him, (unless, indeed, they claim under grants not rendering rent,) for he is interested, [3] in-  
[ \*251 ] as much as \*he may prefer one tenant to another. (d) In like

(b) *Doe, d. Forster, v. Williams*, Cowp. 611. *Bourne v. Turner*, Stran 632.

(d) *Fox v. Stoen*, Styl. 452. *Bel v. Harwood*, 3 T. R. 306.

(c) *Doe, d. Jones, v. Wilde*, 5 Taunt. 183.

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in the absence of other evidence, to presume liability for *mesne profits*, not to be incompetent as a witness for the plaintiff, on the ground of interest. *Unger vs. Wiggins*, 1 Rawle's Rep. 331.

The grantor in a quit claim deed is a competent witness for the grantee, in Ejectment brought by the latter for the land conveyed. *Jackson ex dem. Weidman vs. Hubble*, 1 Cowen's Rep. 613.

In Ejectment, one who has delivered possession of the premises in question to the defendant, upon his parol agreement to purchase, cannot be a witness for him. *Jackson ex dem. Roosevelt & Al. vs. Stackhouse*, 1 Cowen's Rep. 122.

The grantee of land, by a quit claim deed, is a competent witness in an action of Ejectment between other persons, to establish such deed. *Kline vs. Bebee*, 6 Connect. Rep. 494.

[2] In Ejectment, the defendant's son is not a competent witness to prove, that he, and not his father, is tenant in possession. *Doe ex dem. Jones & Al. vs. Wilds*, 1 Marshall's Rep. (Eng. Com. Pl.) S. C. 5 Taunt. Rep. 183. (Acc. *Doe ex dem. Lewis & Al. vs. Bingham*, 4 Barnew & Ald. Rep. 677.)

[3] A trustee in a deed of trust conveying property to be sold for payment of a debt, is equally the agent of the debtor and the creditor, and a competent witness in an action of Ejectment against the debtor in behalf of a purchaser from himself, (to whom he has made a deed with a warranty against himself and his heirs only,) to prove that the sale of the property was advertised according to the terms of the deed of trust. *Ross vs. Norvell*, 3 Munf. Rep. 170.

The lessor of the plaintiff sworn as a witness, at the circuit, without objection, in order to prove the loss of a deed. *Jackson ex dem. Swartwout & Ux. vs. Johnso* 5 Cowen's Rep. 75.

manner, a person who has mortgaged lands cannot be an evidence \*concerning them; for the equity of redemption still [ \*252 ] remains in him.(e) An heir apparent may, however, be a witness concerning the title of the land, because his heirship is a mere contingency; but a remainderman cannot, for he hath a present estate in the land; and this rule extends to the remainderman in tail.(f)

Let us now consider the proofs to be adduced by a claimant in ejectment, when his title to the lands can be controverted.[1]

(e) *Anon.* 11 Mod. 354.

(f) *Smith v. Blackham*, Salk. 283.

[1] In an Ejectment by A. for the use of the heirs of B., a deposition taken in a former Ejectment by B. against the same defendants, for the same land, but in which the plaintiff claimed under a different title, cannot be read in evidence. *Cluggage & Al. vs. Lessee of Duncan*, 1 Serg. & R. Rep. 111.

In special verdict in Ejectment, or on a writ of right, if the ancestors of a party be stated to have been successively seised and possessed from 1669 to 1730; and no interruption be found, the maxim "that what appears not is to be taken as not having existed," fixes such seisin and possession to have been uninterrupted. *Birch vs. Alexander*, 1 Wash. Rep. 34, 37.

Where an Act for vesting certain lands of D. C. in C. C., referred to a location and enumeration of the lands of D. C. made, &c. and delivered to the commissioners of forfeitures, and directed them to be appraised by such persons as the commissioners of forfeitures should appoint, and the appraised value to be paid either to the commissioners, or Treasurer, &c.; as against the State, the location and enumeration, thus adopted by the Act, are conclusive that the lands mentioned in them belonged to D. C. *Jackson ex dem. Swartwout vs. Cole*, 4 Cowen's Rep. 587.

An exemplification of a copy of the certificate of the appraisers filed in the Treasurer's office, having an endorsement by the Treasurer upon it, that the original had been delivered to C. C. deceased, and it being shown that it could not be found among the papers of C. C., was held admissible in evidence, though it was the exemplified copy of a copy. *Ibid.*

This copy having been furnished to the Treasurer by the commissioners of forfeitures for his information, and as his guide, under the Act for vesting the land in C. C., may be regarded as an original for some purposes, and especially as against the State, the Treasurer having indorsed upon it all he did under it. *Ibid.*

Where a state officer, e. g. the Treasurer, does an act which would be a violation of his duty, unless certain terms or conditions had first been performed by an individual, as between the State and the individual, such performance shall be deemed, *prima facie*, to have taken place. *Ibid.*

A. died seised of lands, leaving three sons, B., C., and D. In Ejectment by the heirs of B., against E., who claimed to hold under D., E. offered in evidence the will of A., dated 1757, by which he devised his real

When the party claims as heir at law, he must prove that the ancestor from whom he derives his title, was the person last seised of the actual freehold and inheritance; that is to say, who was last actually in possession of the lands in fee-simple, (g) and that he, the claimant is his heir.[2]

The seisin of the ancestor may be proved in the first instance, by showing that he was either in the actual possession of the [ \*253 ] premises, at the time of his death, or in \*the receipt of rent

(g) Co. Litt. 11. b. *Jenkins, d. Harris, v. Pritchard*, 2 Wils. 45.

estate to his three sons and their heirs, in equal proportions; but it being objected that the will was void, on account of the insanity of the testator, *E.*, waived the production of the will and relied on a *parol* partition of the testator's estate, between the three sons, made in 1786, a previous holding by them as tenants in common, and the separate possession under the partition of *D.*, continued from that time: *Held*, that, though when a tenancy in common is admitted, a *parol* partition, followed by possession under it, will be valid; yet, when the whole right or title of the party setting up the tenancy in common, and *parol* partition is denied, a *parol* partition and possession under it, will not be sufficient to transfer the title; that by waiving the will of *A.* the title was to be considered in *B.*, as heir at law, and could not be divested by *parol*. *Jackson ex dem. Van Beuren & Al. vs. Vosburgh*, 9 Johns. Rep. 270.

Though, after a possession by *D.* for so long a time a tenancy in common might have been presumed; yet, by offering the will of *A.*, and waiving it, the door was shut against the presumption of any other source of title. *Ibid.*

Where, in Ejectment, the defendant gave evidence to show that certain lands of *D. C.* under whom the lessors of the plaintiff claimed title, were forfeited by an act of attainder, *Held*, that this was *prima facie* evidence that the title to the premises in question was once in *D. C.*, and that the plaintiff might without further proof of the title in *D. C.*, proceed to deduce a title from him. *Jackson ex dem. Swartwout & Uz. vs. Cole*, 4 Cowen's Rep. 587.

[2] If a naked power to sell be given to executors, the land in the mean time descends to the heir, and an Ejectment may be brought for it in his name. *Brown vs. Dysinger & Al.* 1 Rawle's Rep. 408.

On the death of a person, intestate, leaving no widow nor lawful issue, but a father, and brothers and sisters, the remainder, in fee, vests in the brothers and sisters, under the 6th section of the act of 19th April, 1794, at the same instant that the life estate passes to the father. *M'Comb vs. Dillo*, 5 Serg. & R. Rep. 304.

Therefore a person who has married one of the sisters, cannot be a witness in favour of the father in an Ejectment for land, that descended from such intestate, though he has released all his interest in possession, remainder or reversion in his own right, or the right of his wife. *Ibid.*

from the ter-tenant; for possession is presumptive evidence of a seisin in fee, until the contrary be shown.(h) If, however, it is probable that the defendant may be able to rebut this presumption, the lessor should be prepared with other proofs of his ancestor's title.

In order to show the heirship of the claimant, he must prove his descent from the person last seised, when he claims as lineal heir, or the descent of himself and the person last seised from some common ancestor, or at least from two brothers or sisters,(i) if he claims collaterally; together with the extinction of all those lines of descent which would claim before him. This is done by proving the marriages, births and deaths, necessary to complete his title, and showing the identity of the several parties.

Thus, supposing *A.* the claimant and *B.* the person last seised, to be cousins, descended from a common ancestor *C.*, *B.* being the only child of *D.*, the elder son of *C.*, and *A.* the only child of *E.*, the younger son of *C.* In this case *A.* must prove the marriage of *C.*, the birth and marriage of *D.*, the birth, marriage, and death of *E.*, the birth and death without issue of *B.*, and his own birth;(j) for it is a maxim of law, that he who asserts the death of another, who was once living, must prove his death, whether the affirmative issue be that he be dead or living.(k)

\*The testimony of persons present when the events happened, or who knew the parties concerned at those periods, and the productions of extracts from parish registers, are the most satisfactory modes of proving facts of this nature; and when the claimant is the lineal descendant of the person last seised, but little difficulty can arise in procuring the necessary proofs. But when he claims as collateral heir, and it is necessary to trace the relationship between him and the person last seised through many descents to a common ancestor, difficulties often intervene, from the remoteness of the period to which the inquiries must be directed, which, upon the ordinary rules of evidence, would be insuperable. To remedy this evil, the courts, from the necessity of the case, have relaxed those rules in inquiries of this nature; and allow hearsay and reputation (which latter is the hearsay of

(A) B. N. P. 108.

(j) 2 Blk. Comm. 208, &amp;c.

(i) *Roe, d. Thorne, v. Lord*, 2 W. Blk. 1099.(k) *Wilson v. Hodges*, 2 East, 812.

those, who may be supposed to have known the fact, handed down from one to another) to be admitted as evidence in cases of pedigree.(l)

Thus, declarations of deceased members of the family are [ \*255 ] admissible evidence to prove relationship ; as who was \*a person's grandfather, or whom he married, or how many children he had, or as to the time of a marriage, or of the birth of a child, and the like, of which it cannot reasonably be presumed, that better evidence is to be produced.(m) So also declarations made by a deceased husband as to the legitimacy of his wife, are evidence, though he was not related to her by blood ; for the husband must be supposed to have more intimate knowledge on that subject than a distant relation.(n) In like manner the declarations of parents, as to whether they were ever married, or whether their children were born before or after marriage, is admissible evidence ; although their declarations cannot be received to bastardize their children born in wedlock.(o)

But hearsay evidence is not admissible to prove the *place* of any particular birth ; for that is a question of locality only, and does not fall within the principle of the rules applicable to cases of pedigree : (p) nor are the opinions of deceased neighbors, or of the acquaintances of the family, evidence on questions of this nature ; (q) nor is [ \*256 ] \*the hearsay of a relative to be admitted when the relative himself can be produced.(r) It is also necessary, in order to entitle the declarations of a deceased relative to be admitted, that they should be made under circumstances, when the relation may be supposed without an interest, and without a bias ; and, therefore, if they are made on a subject in dispute after the commencement of a suit, or after a controversy preparatory to one, they ought not to be received, on account of the probability that they were partially drawn from the deceased, or, perhaps, intended by him to serve one of the contending parties.(s)

Entries in family bibles, or other books, may likewise be received in

(l) *Higham v. Ridgway*, 10 East, 120.

(m) B. N. P. 294

(n) *Vowels v. Young*, 13 Ves. Jun. 148.

(o) *Goodright, d. Stevens, v. Moss*, Cowp. 591.

(p) *Re v. Inhabitants of Erith*, 8 East, 542.

(q) *Vowels v. Young*, 13 Ves. 147, 514.

*Re v. Inhabitants of Erinswell*, 3 T. R. 707, 723. *Weeks v. Sparke*, 1 M. & S. 688. *et vide* 14 East, 380.

(r) *Pendrell v. Pendrell*, Stran. 294. *Harrison v. Blades*, 3 Campb. 457.

(s) *The case of the Berkeley Peerage*, 4 Campb. 401.

evidence in questions of pedigree.(t) So also recitals in family deeds, monumental inscriptions, engravings on rings, old pedigrees hung up in a family mansion, and the like.(u) And where a will of a deceased ancestor was found, amongst the papers of the person last seised, cancelled, and no evidence was given of its having ever been proved or acted upon, it was nevertheless allowed to be read in evidence as a paper relating to the family; the place in which it was found being considered as amounting to its recognition, by the party last seised, as the declaration of his ancestor concerning the state of his family.(v) And in a late case, proof by one of the family, that a particular person had many years before gone abroad, and was supposed to have died there, and that the witness had not heard in the family of his having married, was held good *\*prima facie* evidence of the person's death without [ \*257 ] lawful issue.(w)

The original visitation books of heralds, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them on oath, are allowed to be good evidence of pedigrees.(x)

When the lessor claims as heir to copyhold premises, he must, in addition to the foregoing evidence, produce the rolls of the manor.(y) which show a surrender to him, or to those under whom he claims; but it is not necessary that he should prove his own admittance, unless the ejectment be against the lord.(z) If however, the ejectment is against the lord, he must either show that he is admitted, or that he has tendered himself to be admitted and been refused; but it is not necessary to tender himself to be admitted at the lord's court, if the steward, upon application out of court, has refused to admit him (a)

When he claims as *customary heir*, he must, after proving his pedigree, show that he is heir strictly within the custom, for every custom which departs from the common law is construed strictly; and if the custom

(t) *Whitlocke v. Baker*, 13 Ves. 514.

(u) *Vowels v. Young*, 18 Ves 148.

(v) *Doe, d. Johnson, v. Lord Pembroke*, 11 East, 505.

(w) *Doe, d. Banning v. Griffin*, 15 East, 298. *at vide* 19 Car. II. c. 6. s. 1. *Doe, d. George, v. Jenson*, 6 East, 80.

(x) 2 S. N. P. 772.

(y) *Post*, 270.

(z) *Rumney v. Eves*, 1 Leon, 100. *Holdfast. d. Wooliams, v. Clapham*, 1 E. R. 600. *Doe, d. Tarrant, v. Hellier*, 3 T. R. 162. *Ante*, 66

(a) *Doe, d. Burrell, v. Bellamy*, 2 M. & S. 87. *Ante*, 67.



be silent, the common law must regulate the descent.(b) Thus, where the custom is that the eldest *sister* shall inherit, the eldest [ \*258 ] *aunt* or *niece*, is not within it.(c) So, also, if the custom be that the youngest *son* shall inherit, it will not extend to the youngest *nephew*.(d)

The usual method of proving these several customs, is by means of the different admissions of the customary heirs upon the court rolls of the manor, produced by the steward upon oath, or by the medium of verified examined copies. But if the ancient court rolls should be lost, or there should be no instance of an admission upon them, similar to the custom set up by the lessor, an entry upon the rolls, stating the mode of descent of lands in the manor, will be admissible evidence as to the existence of the custom.(e) Where, however, the lessor claimed as youngest nephew, and produced, as the only evidence to support his title, an admission upon the court rolls of a youngest nephew as customary heir, at a court-leet and baron held in 1657; and for the defendant it appeared upon the same rolls, that at a court-leet and baron held in 1692, the jury and homage found, that the custom of descent extended only to the youngest son, and if no son, to the youngest brother, and no farther; (which entry was corroborated by two old witnesses, who testified, that they had heard and believed that the custom went no farther;) upon a verdict being found for the lessor of the plaintiff, the Court refused to set it aside.(f)

It may here be useful to observe, that when the lessor claims as heir, and proves his pedigree and stopa, and the defendant sets up [ \*259 ] a new case, which is answered by fresh *evidence* on the part of the lessor, the defendant is entitled to the general reply.(g) And if, after the pleadings are opened by the junior counsel for the lessor, the defendant's counsel expresses himself ready to admit the lessor to be the heir, it will entitle him to open the case, and make the first address to the jury.(h)

(b) Co. Copy 48.

(c) *Radcliff v Chaplin*, 4 Leon. 242.

(d) 1 Roll. 624.

(e) *Roe, d. Beebee, v. Parker*, 5 T. R. 26.  
*Denn, d. Goodwin, v. Spray*, 1 T. R. 406

(f) *Doe, d. Mason, v. Mason*, 3 Wils. 63.

(g) *Goodtitle, d. Revett, v. Braham*, 4 T. R. 497.

(h) So ruled by *Le Blanc, J.* in *Fenn*, d.

*Wright, v. Johnson*, Nottingham Summer Assizes, 1813, MS. and by *Wood, B.* in a subsequent ejectment between the same parties, Nottingham Lent Assizes, 1814, MS.—But ruled *contra* by *Gibbs, J.* in a previous ejectment between the same parties, Derby Lent Assizes, 1813, MS. on the principle that a defendant cannot compel a plaintiff to receive admissions.

When the lessor claims as the devisee of a freehold[1] interest at common law, or of a customary freehold where there is no custom to surrender to the use of the will,(i) he must prove the seisin of his devisor,(j)[2] and the due execution of the will,[3] (unless it be more

(i) *Hussey v. Grilla*, Amb. 299.

(j) *Ante*, 252

[1] A devise of the testator's *estate*, generally, passes both real and personal estate, and may include a debt and mortgage. *Jackson ex dem. Livingston vs. Delancey*, 11 Johns. Rep. 365.

No technical words are necessary to devise a fee, and the intention of the testator, to be collected from the whole will, is to govern. *Jackson ex dem. Herrick vs. Babcock*, 12 Johns. Rep. 389.

The testator devised as follows : " I give to my wife, after payment of debts, &c. all my estate, real and personal, that I may be in possession of at my decease, to be at her absolute disposal, according to an agreement made and entered into with her, on the 27th October, 1802, and previous to our marriage ; it being my intention, if my said wife should die before me, that my real and personal estate shall be divided among my said children, their heirs and assigns." *Held*, that the wife took an estate in fee, not by implication, but by force of the words " all my estate to be at her absolute disposal ;" that as, by reference to the agreement in writing mentioned in the will, it appeared that it was intended, that after the death of one, the other should have the full benefit of survivorship in the joint estate created by that agreement, it showed the intention of the testator to dispose of the fee ; and the use of the word *heirs* in the devise to the children did not show an intention in the testator to limit the preceding devise to his wife, to her life only. *Ibid*.

A will has no effect or operation, until the death of the testator, who, in the mean time, may revoke it in whole or in part. *Matter of Nan Michel*, 14 Johns. Rep. 324.

The words of a will were, " *my property*, after my debts are paid, I leave to my beloved wife, A., and wish her to educate my two daughters, J. and G., with care, and to treat them with kindness and affection," without any personal bequest except a ring to a third person, or other words to explain or control them ; *Held*, that the *real and personal* estate of the testator passed to the wife in fee. *Jackson ex dem. Pearson vs. Housel*, 17 Johns. Rep. 281.

[2] A right of entry in land is devisable, within the Statute of Wills. (1 R. L. New-York. 364,) though at the time of the devise and of the devisor's death, the land be in the actual possession of another who claims and holds it adversely. *Jackson ex dem. Eden & Al. vs. Varick & Al.* 7 Cowen's Rep. 238. Affirmed on Error, 2 Wend. Rep. 166. & *Vide Waring vs. Jackson ex dem. Eden & Al.* (IN ERROR,) 1 Peters' Rep. Sup. Court U. S. 571 ; where the same point is decided.

CONTRA. *Smith, ex dem. Roosevelt vs. V. n Deusen*, 15 Johns. Rep. 343.

[3] The sanity of a testator is presumed until the contrary appears ; and the *onus probandi*, as to his mental incapacity, lies on the party who

than thirty years old,) pursuant to the provisions of the statute 29 Car.

*Et Vide* "Revised Statutes" of New-York, Part 2, Chap. 6, Tit. 1, §§ 1, 2, 3. (Cited *POST* Page 261 n [1].)

The words used in the Statute of Wills of Kentucky of "possession, reversion or remainder," are to be construed as descriptive of the nature of the estate to be devised, and not the particular situation thereof: An entry or patent is devisable, nor will the intrusion of a stranger affect the power to devise it. *May's Heirs & Devisees vs. Slaughter*, 3 Marsh. Rep. (Ky.) 508.

G. being seised of two tracts of land, called C. and W., of which W. was the eldest tract, devised C. to F.; and by a subsequent clause in his will directed that W. should be sold for the payment of his debts. Under this direction W. was sold to M. The lines of the two tracts conflicted; and in an action of Ejectment brought by the devisee of C., (the junior tract,) against M. to recover that part of C. which was included within the limits of W. (the elder tract.) Held, that the plaintiff was not entitled to recover. That the true construction of the devise of C. was, that the devisee thereof took only so much of that tract as was not covered by the lines of W., the elder tract. *Benson's Lessee vs Musseter*, 7 Harr. & Johns. Rep 208.

In an action of Ejectment where the defendant's title to the land sued for, and his only defence was under a supposed will of a former owner, and it appeared that there had been a former action of Ejectment against the defendant, in which the same question was in issue, and in which the said supposed will was adjudged to be invalid, and the case on that ground decided against him: Held, that he was not thereby concluded from going into evidence to establish the legality of the will. *Edelen vs. Hardy's Lessee*, 7 Harr. & Johns. Rep. 61.

alleges his insanity. *Jackson ex dem. Van Dusen vs. Van Dusen*, 5 Johns. Rep. 144.

But if a mental derangement has been proved, it is then incumbent on the devisee to show a lucid interval, or the sanity of the testator at the time of executing the will. *Ibid.*

Parol evidence, to show that the testator executed a will under duress, may be received; but not of the declarations of the testator himself as to that point. *Jackson ex dem. Coe vs. Kniffen*, 2 Johns. Rep. 31.

An alteration made in a will, whether material or immaterial, by a person claiming under it, renders it void. *Jackson ex dem. Malin vs. Malin*, 15 Johns. Rep. 293.

But whether a material alteration by a stranger, without the privity of the party claiming under it, has the same effect? *Quere. Ibid.*

A testatrix devised as follows: I give, &c. to my daughter E. R. all my property in W., in the state of Connecticut, all the land deeded to me by B., excepting 1000 Acres of Land I deeded to R. M." &c. It was alleged that the word also had been erased between the words "Connecticut" and "all," after the execution of the will, so as to give R. M. not only the 1000 acres, but the land out of which it was excepted: Held, that the alteration if any, was immaterial, and did not vitiate the will, for whether the word also was inserted or not, the legal construction and effect

II. c. 3. s. 5. If, however, the will be thirty years old, or upwards,

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If it be proved on a trial in Ejectment, that the father of the lessor of the plaintiff, who devised the land to him, was in possession thereof many years before until his death, and that the lessor of the plaintiff afterwards conveyed it to a person who was in possession at the time of his death; the jury may presume that the lessor of the plaintiff was in possession from the death of his father to the date of the conveyance, if it be not proved that some other person in the mean time had the possession. *Moore vs. Gilliam*, 5 *Munf. Rep.* 346.

of the will was the same, the land deeded to the testatrix by B., *excepting the 1000 Acres she had deeded to R. M.*, was devised to R. M. *Ibid.*

The record of a will, proved under the statute, (*Sess.* 24, c. 9, s. 6. 1 *N. R. L.* 365.) is not conclusive upon the heir, so as to prevent the admission of evidence to impeach its validity. *Jakson ex dem. Woodhull, vs. Rumsey*, 3 *Johns. Cas.* 234.

The record of a will, like that of a deed, is only *prima facie* evidence of its authenticity. *Ibid.*

The fact of a *rasure* in a deed may be proved by any other person than the subscribing witness. *Penny v. Carwithie*, 18 *Johns. Rep.* 499.

Where a power was given by will to several executors to sell, one of whom renounced, and another articted to convey, and received the purchase money, and the vendee took possession, evidence of the prior and subsequent declarations of the acting executors, approving and ratifying the sale, is admissible, and such circumstances establish a parol title upon which the vendee may recover in Ejectment. *Taylor vs. Adams*, 2 *Serg. & R. Rep.* 534.

A recital in a will is an estoppel to parties claiming under the will.—*Denn vs. Cornell*, 3 *Johns. Cas.* 174.

So, where A., by his last will and testament, among other things, devised as follows: *And whereas I have conveyed to my son C. my lands at C., and to my son D. my lands at F., I give and devise all my remaining lands and tenements, and real estate whatsoever, to my sons C. and D., and my daughter, &c.*; Held, that the recital in the will was evidence of the conveyance of the farm in F. to D., and that C., as heir of the testator, was estopped, by the recital, to deny that the farm was conveyed to D.; and that the necessary intentment, from the language of the clause in the will, was, that it was a conveyance in fee to D. *Ibid.*

The circumstance that a writing exhibited for probat, as a last will and testament, was wholly written by the testator himself, is *prima facie* evidence that he was in his senses, and able to make a will at the time of writing the same; so that the *onus probandi* to repel that presumption, lies on those who wish to impugn it. *Temple & Taylor, vs. Temple*, 1 *Hen. & Munf. Rep.* 476.

In such case, proof that the testator's intellects were much impaired by the use of opium and ardent spirits, and that in consequence thereof, he was frequently incapable of business, is not sufficient to repel the presumption, without proof, that such was his condition at the time when the writing was executed. *Ibid.*

[\*260] it may be read in evidence without proof; [4] and, it seems, \*that

Grammatical inaccuracies, want of knowledge of points of law, or omission of a part of the testator's property, are circumstances not sufficient to vitiate a will. *Ibid.*

A testator's bequeathing (among other things,) an article of property which does not belong to him, is, at most, only a circumstance from which to infer a state of mind unfavourable to the making of a testament; and ought not to prevail against positive testimony, shewing his competency to make a will at the time in question. *Marks & Ux. vs. Bryant & Ux.* 4 *Hen. & Munf. Rep.* 91.

An issue will be directed to try whether a will alleged to be lost, was ever in fact made, and what were its provisions. *Brent vs. Dold, Gilm. Rep.* 211.

A will conveying real estate, was wholly written by another, and signed by that other, with the name of the testator: There were two subscribing witnesses to this paper, one of whom saw the signature and heard the testator acknowledge that it was signed by his authority; the other does not say whether the paper was signed or not at the time of his attestation, the testator merely declaring, "it is my will." It was *Held*, that such a paper was not proved according to the requisitions of the statute. *Burwell & Al. vs. Corbin & Al.* 1 *Rand. Rep.* 131.

[4] In order that a will may be given in evidence as an ancient deed, there should have been a possession of 30 years, in conformity to it; a lapse of thirty years, since the execution of it by the testator, is insufficient. *Jackson ex dem. Burhans vs. Blanshan,* 3 *Johns. Rep.* 292.

The acts and declarations of third persons, in possession of lands, are admissible in evidence, to prove a continued possession under an ancient will, so as to make out its formal execution. *Jackson ex dem. Van Dusen vs. Van Dusen,* 5 *Johns. Rep.* 144.

Mere efflux of time, as thirty years or more, from the date of a Will, does not entitle it to be read without further proof. *Jackson ex dem. Hunt & Al. vs. Luquere,* 5 *Cowen's Rep.* 221.

But possession for thirty years, under a Will, entitles it to be read as an ancient Will, without further proof, the same as a deed. *Ibid.* & *Vide Jackson ex dem. Henry vs. Thompson,* 6 *Cowen's Rep.* 178.

And, it seems, that it is not necessary to shew that all the devisees were thus in possession under the Will; but the possession of a part under it, will be sufficient. *Ibid.*

A possession of part under a Will, for less than thirty years, accompanied with proof satisfactorily accounting for the absence of all the subscribing witnesses, as where they are dead: and proof of the hand-writing of one; and the acts of the devisees of the land in question; as possessing it, claiming under the Will, and executing deeds of partition, reciting the Will, and the like; are also sufficient to entitle it to be read in evidence, without farther proof. *Ibid.*

An ancient Deed which has not accompanied the possession, is not admissible in evidence, without proof of its execution. *Arnold & Al. vs. Gorr & Al.* 1 *Rawle's Rep.* 223.

the age of the will is to be reckoned from the day it bears date, and not from the time of the testator's death.(k)[1].

(k) *McKenire v. Frazer*, 9 Ves. jun. 5 et *v. Gough*, 4 T. R. 707. (in notis.)  
vide n. † to the case of *Gough*, d. *Calthorpe*,

In the case of *Jackson ex dem. Lewis & Al. vs. Laroway*, (3 Johns. Cas. 283, 286.) the Will under which the plaintiff claimed was executed in 1723. Upon this instrument were several endorsements; (viz.) 1st a certificate of a justice of the peace of the former Colony of New-York, dated in 1733, stating that one of the witnesses to the will had appeared before him, and deposed to the execution of the will by the testator as his voluntary act and deed; 2. a certificate of one of the judges of the Court of Common Pleas, of *Dutchess* County, dated the 9th of *October*, 1733, stating the like proof, before him, by another of the subscribing witnesses; 3. a certificate of the clerk of *Dutchess* County, dated the 21st *July*, 1735, that the will was recorded in his office; 4. a certificate dated the 16th *May*, 1744, signed by a judge and two assistant justices of the Court of Common Pleas of *Dutchess* County, and also by the clerk of the same court, stating, that the will had been proved before them, in open court, by the two witnesses above mentioned, who deposed, that they saw the testator sign, seal, publish, and declare the same, as his last will; that he was of sound mind; that they subscribed their names thereto, as witnesses, and that they also saw the other witness subscribe his name thereto as such. The premises in question lay in the County of *Greene*, late part of the County of *Ulster*, but never a part of *Dutchess* County. Neither the deviser nor any person claiming under his will, ever had actual possession of the premises in question; which were in a wild and uncultivated state and actually in the possession of no one until the year 1753, when possession was taken by the defendant's ancestors; but it did not appear that the heirs or representatives of the testator had any notice of that possession till a long time afterwards. It was *Held* that the "Endorsements," could not be received as evidence of the due execution of the will, because the proofs which they certified were wholly unauthorized, either by the statute or common law. But that the proof of the handwriting of those persons who certified ought to have been received, with a view to show the antiquity of the instrument, and that it existed at the periods when those certificates bear date, and that this "would be a more satisfactory account of the will than to show that "it had been found among the evidences of the testator's estate, or among "the archives of his family, which, in similar cases, has been admitted to be "sufficient." And RADCLIFF, J. who delivered the Opinion of the Court, said; "The general rule on this subject, I take to be, that a deed appearing to be of the age of thirty years may be given in evidence, without "proof of its execution, if the possession be shown to have accompanied "it, or where no possession has accompanied it, if such account be given "of the deed, as may be reasonably expected, under all the circumstances of "the case, and will afford the presumption that it is genuine. This rule is

[1] In the case of *Doe ex dem. Oldham & Uz. vs. Wolley*, (8 Barnew. & Cress. Rep. 20.) it appeared on the trial that the lessors of the plaintiff claimed as devisees of *Francis Wolley*, who was said to be the heir of *T. Wolley*, who died in 1800, seised of the estate in question, having devised it to his widow for life, remainder to his right heirs. This will was dated

The statutory regulations for the execution of wills, containing devi-

"founded on the necessity of admitting other proof, as a substitute for the production of witnesses who cannot be supposed any longer to exist. A cotrespondent possession is always high evidence in support of such a deed; but where no such possession appears, other circumstances are admitted to account for it, and raise a legal presumption in its favour." & *Vide Jackson ex dem. Hunt & Al. vs. Luquere*, 5 Cowen's Rep. 225, 226, where this case is cited and confirmed.

more than thirty years before the trial, but one of the subscribing witnesses was proved to be still living; and it was insisted for the defendant that he must be called to prove the execution of the will, as the testator had died within thirty years. The learned Judge (VAUGHAN, B.) thought that the thirty years must be computed from the date of the will, and overruled the objection. In order to prove that *Francis Wolley* was heir of *T. Wolley*, the testator, a deed was produced, being a settlement made in 1689, on the marriage of *Thomas Wolley*, the grandfather of *T. Wolley*, the testator; by which it appeared that he had several brothers, of whom *Edward*, the grandfather of *Francis Wolley*, was the youngest. No evidence was given to shew what had become of the other brothers, or that they died without issue. But wills of some members of the family, made after the date of the marriage settlement, were produced, and they did not mention any brothers, except the grandfather of *T. Wolley*, the testator, and the grandfather of *Francis Wolley*. The judge said, that, in the absence of any evidence to the contrary, the jury might presume that they died without issue; and the jury found a verdict for the plaintiff.

The defendant moved for a new trial, on two grounds: *First*, that the will of *T. Wolley* was improperly received in evidence, for that the plaintiff should have called the existing subscribing witness to prove the due execution of it. *Secondly*, the learned Judge ought not to have allowed the jury to presume that the elder brothers of *Francis Wolley's* grandfather died without issue.

Lord TENTERDEN, C. J. (*who delivered the Opinion of the Court*.) said, "As to the first point, I am of opinion that the rule of computing the thirty years from the date of a deed, is equally applicable to a will. The principle upon which deeds after that period are received in evidence, without proof of the execution, is, that the witnesses may be presumed to have died. But it was urged that when the existence of an attesting witness is proved, he must be called. That, however, would only be a trap for a nonsuit. The party producing the will might know nothing of the existence of the witness until the time of the trial. The defendant might have ascertained it, and kept his knowledge a secret up to that time, in order to defeat the claimant. As to the other point, it must at all events be admitted that the death of the grandfather's brothers might be presumed, and then, in order to raise the objection, two affirmatives must be presumed, viz. that they did marry, and did leave issue. I think that would be very unreasonable, and that the direction of the learned Judge was right." Rule refused.

In the case of *Jackson ex dem. Bowman vs. Christman*, (4 Wend. Rep. 277, 282,) the plaintiff offered in evidence a will of more than 40 years standing after the death of the testator, as an ancient will, without proof of its ex-

ses of freehold lands, are to be found in the fifth section of the statute of frauds,<sup>(1)</sup> whereby it is enacted, that "all devises and bequests of any lands, or tenements, devisable either by force of the statute of wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed, in the presence of the devisor, by three or four

(1) 29 Car. II. c. 3.

execution. It was objected to on the part of the defendant, but admitted by the Circuit Judge; whereupon a verdict was taken for the plaintiff, subject to the Opinion of the SUPREME COURT, which was delivered by SUTHERLAND, J., who said:

"I am inclined to think the will was properly admitted in evidence as an ancient will without proof of its execution, although one of the subscribing witnesses was shewn to have been still alive and within the jurisdiction of the court. The will was executed in 1785, and the testator died in July, 1787. The cause was tried in 1828 and it was clearly proved that the lands devised by the will had ever since the death of the testator, been held under the will and according to its provisions.—The will therefore was more than 40 years of age, with a corresponding possession during the whole period. It is not denied, if the attestation of the witnesses had stated every thing requisite to a complete and valid execution of the will, that it might have been read as an ancient will without further proof. (2 *Esp. Rep* 665. 1 *Phil. Ev.* 408, 441. 4 *T. R.* 707, 709. 6 *Cowen*, 202. 3 *Johns. Cas.* 283. 3 *Johns. R.* 292. 6 *Binney*, 435.)

"The attestation does not state that the witnesses subscribed their names in the presence of the testator. Although it is usual and proper to insert that fact in the attestation, it is not absolutely necessary, and the omission will not conclude the jury from finding that the will was so subscribed. (*Price v. Smith, Willes*, 1. *Croft v. Pawlet*, 2 *Strange*, 1109. *Hand v. James*, 2 *Comyn's R.* 530. 4 *Taunt.* 217. *Bull. N. P.* 264. 1 *Phil. Ev.* 438, 440.) It is a question for the consideration of the jury, to be determined upon the evidence; and if the witness had been produced, and had been unable to recollect any of the circumstances attending the execution of the will, the jury would notwithstanding have been bound to find in favour of its due execution. If the subscribing witnesses all swear that the will was not duly executed, the devisee may notwithstanding go into circumstantial evidence to prove its due execution; (*Bull. N. P.* 264; *Strange*, 1026, 1096; *Lowe v. Joliffe*, 1 *Black. Rep.* 365;) and what circumstances would justify a stronger presumption in favour of the validity of a will than the fact that the devisees, who had all the means of knowledge in their power, treated it as a valid will, entered upon and divided the estate according to its provisions, and continued so to hold and enjoy their respective portions for more than 40 years?"



[ \*261 ] " \*credible witnesses, or else shall be utterly void and of "none effect." [1]

This section of the statute of frauds is very loosely worded, and it

[1] The "*Revised Statutes*" Part 2, Chap. 6, Tit. 1, §§ 1, 2, 3, 4, 5, 6, 7, 40, 41, 42, 43, 44, 49, & 52, (*Vol. 2, pp. 56, 57, 63, 64, 65 & 66*) contain the following provisions relative to Wills.

" Section 1. All persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate, by a last will and testament, duly executed according to the provisions of this Title.

" § 2. Every estate and interest in real property descendible to heirs, may be so devised.

" § 3. Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorised by its charter, or by statute, to take by devise.

" § 4. Every devise of any interest in real property, to a person who, at the time of the death of the testator, shall be an alien, not authorised by statute to hold real estate, shall be void. The interest so devised, shall descend to the heirs of the testator; if there be no such heirs competent to take, it shall pass under his will to the residuary devisees therein named, if any there be, competent to take such interest.

" § 5. Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise, at the time of his death.

" § 6. If by any will, any real estate be charged with any debt, and the creditor whose debt is so charged, shall attest the execution thereof, such creditor, notwithstanding such charge, shall be admitted as a competent witness, to prove the execution of such will.

" § 7. When any real estate shall be devised by will, any executor or devisee named therein, and any person interested in such estate, may have such will proved, before the surrogate of the county, to whom the probate of the will of the testator would belong, in respect to personal property, under the second Article of this Title."

" § 40. Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner :

" 1. It shall be subscribed by the testator at the end of the will :

" 2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses :

" 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament :

" 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.

" § 41. The witnesses to any will, shall write opposite to their names their respective places of residence; and every person who shall sign the

will be necessary to enter rather largely into the different points, which have arisen respecting the due execution of a will under it.

The first solemnity required is the signature of the testator; but it is

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testator's name to any will by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who will sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid, be excused or incapacitated on that account, from testifying respecting the execution of such will.

" § 42. No will in writing except in the cases herein after mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

" § 43. If after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his life-time or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation, shall be received.

" § 44. A will executed by an unmarried women, shall be deemed revoked by her subsequent marriage."

" § 49. Whenever a testator shall have a child born after the making of his will, either in his life-time or after his death, and shall die, leaving such child, so after born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in his will, every such child shall succeed to the same portion of the father's real and personal estate, as would have descended or been distributed to such child, if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to, and out of the parts devised and bequeathed to them, by such will."

" § 52. Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, and such legatee or devisee shall die during the life-time of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate."

not necessary that he should sign his name at the bottom of the will; [2] it is sufficient if his name be in any part of it in his own handwriting. As, for instance, a will in the handwriting of the testator, beginning with the words, "I, A. B., do make this my last will," has been held to be properly signed: (m) and if the testator cannot write, his mark will be a sufficient signature. (n) But if the will be on several sheets, and it appear to have been the intention of the testator to sign every one, but, from weakness or incapacity, he leave some of them unsigned, it will not, it seems, be a sufficient execution within the statute. (o) The effect of sealing alone is not yet quite decided; but it is the better opinion, that it is not a sufficient signature. (p)

It is not required by the statute, that the witnesses should see the devisor sign, or that he should sign in their presence, or that they should be informed of the nature of the instrument they are about to attest; it is sufficient, if the devisor declare to them, that the signature [ \*262 ] is his handwriting, or even, it seems, without such declaration, if the whole body of the will, as well as the name be written by himself. (q) And in a late case where the testator was blind, the Court of Common Pleas determined, that it was not necessary on that account, under the statute, to read over the will, previous to the execution, in the presence of the attesting witness; although, if there were other circumstances inducing a suspicion of fraud, such an execution would materially strengthen the presumption. (r)

The next formality is the attestation and subscription, It must be attested and subscribed by three, [1] or more witnesses, but it is not neces-

(m) *Lemayne v. Stanley*, 3 Lev. 1.

(n) *Harrison v. Harrison*, 8 Ves. jun. 185. and *Addy v. Griz*, 8 Ves. jun. 504.

(o) *Right, d. Cator, v. Price*, Doug. 241.

(p) *Lemayne v. Stanley*, 3 Lev. 1. *Lee v. Libb*, 1 Show. 69. *S. C. Carth* 85. *Warneford v. Warneford*, Stran. 764. *Smith v. Evans*, 1 Wils. 312. *Ellis v. Smith*, 1 Ves. jun. 11. *S. C. 1 Dick*. 225.

(q) *Grayson, v. Atkinson*, 2 Ves. 454. *Ellis v. Smith*, 1 Ves. jun. 11. *S. C. 1 Dick*. 225. *Trymner v. Jackson*, cited 1 Ves. 487. recog. 2 Ves. 258. *Stonehouse v. Evelyn*, 3 P. Wm. 255. *Peate v. Ougly*, Comyn, 197.

(r) *Longchamp, d. Goodfellow, v. Fish*, 2 N. B. 415.

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[2] But by the "*Revised Statutes*" of *New-York*. "It shall be subscribed by the testator at the end of the will." *Vide* Part 2, Chap. 6, Tit. 1, § 40. (*Cited* SUPRA, n. [1.] )

[1] Two witnesses are sufficient in *New-York*. *Vide* "*Revised Statutes*," Part 2, Chap. 6, Tit. 1, § 40. (*Cited* ANTE, Page 261, n. [1.] )

sary that the attestation and subscription of all the witnesses, should be at one time. Hence, where the deviser published his will in the presence of two witnesses, who subscribed it in his presence, and some time after he sent for a third witness, and published it in his presence also, the will was holden to be duly attested.<sup>(s)</sup> But it is necessary that all the witnesses attest the *same instrument*, and that the instrument attested be that by which the lands are intended to pass. Therefore, where a testator devised his lands by a will, made in the presence of, and attested by two witnesses only, and about a year after made a codicil, whereby he revoked<sup>[2]</sup> a legacy given by his will, \*and de- [ \*263 ]

(s) *Gryle v. Gryle*, 2 Atk. 17. (n.) *Ellis*      *kinson*, 2 Ves. 454, 458.  
v. *Smith*, 1 Ves. jun. 11. 14. *Grayson v. At-*

A *Probate* of a will, proved before the surrogate of the city and county of *New-York*, in the year 1779, after the adoption of the *Constitution* of the state, but while the city of *New-York* was in the possession of the enemy, and which probate was granted by the *Deputy* of the *British* governor, according to the practice of the colonial government, is valid, being confirmed by the act of the 10th *May*, 1784. (1 Gr. ed. Laws, 121.) provided the same be recorded in the office of the judge of probates: and, by an act of the 30th *March*, 1799, the judge of probates being required to deliver to the surrogate of the city of *New-York*, all papers, records, &c. appertaining to the Court of Probates, on the 1st of *May*, 1787, except in particular cases; and as the custody of the will in question belonged to the *Surrogate* of the city of *N. Y.* by the last mentioned act, an *Exemplification* of the record of such will, given by the surrogate of *N. Y.*, accompanied with his certificate, that the original could not be found in his office, is sufficient evidence of such will, in an action of Ejectment, under the *Act concerning Wills*, (Sess. 36. c. 23. s. 21.) by which the exemplification of a will recorded in the office of the judge of probates, before the 1st *January*, 1785, the original of which cannot be found in his office, is allowed to be read in evidence, in real or mixed actions. *Jackson ex dem. Colden vs. Walsh*, 14 Johns. Rep. 407.

[2] The "*Revised Statutes*," Part 2, Chap. 6, Tit. 1, §§ 45, 46, 47, 48 & 53, (*Vol. 2*, pp. 64, 65, & 66,) specify the modes in which wills may be revoked or cancelled.

"§ 45. A bond, agreement, or covenant, made for a valuable consideration, by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.

"§ 46. A charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any

clared that the will should be ratified and confirmed in all things,

covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained, shall pass and take effect, subject to such charge or incumbrance.

"§ 47. A conveyance, settlement, deed, or other act of a testator, by which his estate or interest in property, previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless in the instrument by which such alteration is made, the intention is declared, that it shall operate as a revocation of such previous devise or bequest.

"§ 48. But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen."

"§ 53. If, after the making of any will, the testator shall duly make and execute a second will, the destruction, cancelling or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless after such destruction, cancelling or revocation, he shall duly re-publish his first will."

The mere act of cancelling a will is nothing, unless it be done *animo revocandi*. *Jackson ex dem. Howard vs. Holloway*, 7 Johns. Rep. 394.

So, if the testator, without a republication of his will, make alterations and corrections in it, with the intent not to destroy, but to enlarge and extend a devise already made, it is not a revocation of the devise. *Ibid*.

Parol evidence of the revocation of a will, is inadmissible. *Jackson ex dem. Coe vs. Kniffen*, 2 Johns. Rep. 31. & *Vide Dan & Al. vs. Brown*, & *Al.* 4 Cowen's Rep. 483.

A testator may revoke a will in whole or in part, at any time before his death. *Matter of Nan Mickel*, 14 Johns. Rep. 324.

Where the execution of a will is established, there must, in order to revoke it, be some outward and visible sign of revocation, or cancelling *animo revocandi*. *Jackson ex dem. Browns vs. Betts*, 9 Cowen's Rep. 208. & *Vide SAME CASE*, 6 Cowen's Rep. 377. & *Vide Dan & Al. vs. Brown & Al.*, 4 Cowen's Rep. 483,

If a man let his will stand until his death, it is his will, otherwise not. It is ambulatory till his death. *Ibid*.

Where there are two devises by the same testator, the last operates as a revocation of the first, only so far as it is inconsistent with it. As to the residue the former devise shall stand. *Brant ex dem. Wilson vs. Wilson*, 8 Cowen's Rep. 56.

So, a Codicil not expressly revoking a former will of real estate, though it profess to make a disposition of the whole estate different from the will, if, in fact, it do not do so, but only in part, it is but a revocation *pro tanto*. *Ibid*.

except as altered by that writing, and that his codicil should be taken as part of his will; and executed this codicil in the presence of one of the former witnesses and another person, neither the first will, nor the other witness to it, being present, it was holden to be an insuffi-

A subsequent marriage and birth of a child, is an implied revocation of a will, if the testator did not, after those events took place, republish, or signify an intention that it should be established; and in such case, the will ought not to be proved, or admitted to record. *Wilcox vs. Rootes*, 1 *Wash. Rep.* 140.

A will of personal estate was considered revoked by a subsequent will, which was established as sufficient to pass chattels, though not written or subscribed by the testator; the same, however, having been prepared by his directions, corrected, and afterwards declared by him, to be his will. *Glasscock vs. Smither & Hunt*, 1 *Call's Rep.* 479.

If before the act of 1794, concerning wills, a man having children, made a will and devised his whole estate among them, after which he married a second wife, by whom he had children, and died without altering his will, the second marriage and birth of children, were no revocation of the will. *Yerby vs. Yerby*, 3 *Call's Rep.* 334.

Circumstances may rebut an implied revocation of a will. *Ibid.*

A testator made a will in due form of law, to which he afterwards subjoined a codicil. he then made a second will, and annexed a postscript to it, by which he "revoked all former wills," and signed the postscript: the second will was cancelled by cutting his name out from the body of it, but leaving the postscript with his name subjoined to it. This paper was carefully preserved by the testator; as also his first will; both of which were found after his death. It was determined, that the postscript of the second will was a substantive revocation of the first; and that the cancelling of the second will did not necessarily cancel the postscript, so as to set up the first, as the will of the testator. *Bates vs. Holman, Ex'r.* 3 *Hen. & Munf. Rep.* 502.

It seems, that a deed of trust, conveying all the property of the grantor, to certain persons and their heirs "for ever, with warranty; nevertheless, upon special trust that they shall pay the profits to himself during his life;" concluding with declaring its true intent and meaning to be, that at his death "every thing therein contained between the parties should become null and void," is a conveyance to the trustees and their heirs, of an estate for the life of the grantor only, and not a revocation of a previous will. *Ibid.*

A commission of lunacy against a testator, is not a revocation of a will, which he made when of sound mind. *Ibid.*

The parol declarations of a *devisor* will not amount to a revocation of a will of lands; nor can they be received upon a question of revocation, unless they relate to the *res gesta*. They are then evidence to shew the intent with which the act was done. *Dan & Al. vs. Brown & Al.* 4 *Cowen's Rep.* 483.

To revoke a will by cancellation, this must be done *animo revocandi*.—The slightest degree of cancellation, &c. with intent to revoke, will operate as a revocation. *Ibid.*

cient attestation.(t)[1] And where a testator, by a will *not witnessed*, devised lands, and afterwards made a codicil, and taking the codicil in one hand, and the will in the other, said, "This is my will whereby I have settled my estate, and I publish this codicil as part thereof," the signature of the codicil, by the testator and three witnesses; was held insufficient to render the will valid.(u) But if there be several instruments written by the testator upon one paper, and it plainly appear that his intention was, that all should form but one will, and not a will and codicil, in such case, the execution of the last instrument will be considered as an execution of the whole.(v)[2] So, also, if a will be

(t) *Lee v. Libb*, 3 Lev. 1. S. C. Carth. 35.

(v) *Carlston, d. Griffin, v. Griffin*, Burr.

(u) *Penphrass, v. Lord Lansdown*, cited 549.

Com. 384. *Attorney General v. Barnes*—  
Prec. Cha. 270.

[1] In Ejectment for lands claimed under a will, it is no objection to giving in evidence papers relating to the lands, that part of the testator's interest had accrued after the making of the will. *Burke vs. Lessee of Young*, 2 Serg. & R. Rep. 383.

A devise of lands will not pass lands acquired subsequently to the execution and publication of the will, without a republication. *Jackson ex dem. Howard vs. Holloway*, 7 Johns. Rep. 390. S. P. *Jackson ex dem. Rogers vs. Potter*, 9 Johns. Rep. 312.

Where the testator altered his will, by erasures and interlineations, so as to make the devise extend to all lands of which he should die seised, and endorsed a memorandum to that effect on the will, stating the alterations which he had made, but the memorandum was attested by two witnesses only; *Held*, that the alteration was inoperative, and that lands acquired subsequently to the date of the devise, descended to the heirs at law.—*Jackson ex dem. Howard vs. Holloway*, 7 Johns. Rep. 394.

A republication so as to affect after-acquired lands, must be made with the same solemnities as the execution of the original will. *Jackson ex dem. Rogers vs. Potter*, 9 Johns. Rep. 312.

Where a person made a will, in 1805, devising all his estate, and, afterwards, became seised of other lands, and in his last sickness, in 1810, declared that he had made a disposition of all his estate, by a will which he had deposited with S., and that he did not wish to alter it, except to add another executor; this was *Held* not to amount to a republication of the will, so as to pass the after-acquired lands. *Ibid.*

[2] Where any part of a will is ambiguous, the whole will is to be considered, for the purpose of ascertaining the intention of the testator in that particular part; but where the intention is clear and certain, and no repugnancy appears between the different parts of the will, no such aid is necessary or proper. *Jackson ex dem. Van Vechten vs. Sill*, 11 Johns. Rep. 201.

\*written upon several sheets of paper, but at one time, it will [ \*264 ] be valid, although all the sheets are not executed by the testator, nor signed by the witnesses, nor even seen by them, provided the last sheet be regularly signed and attested, and every part of the will be present at the time of the execution; of which latter fact the presumption of law will be in favour, should the different sheets correspond.(w)

The attestation and subscription of the witnesses must be in the presence of the testator, but proof need not be given, that the testator *actually did see* the witnesses subscribing: their attestation is sufficient, if it appear that he *might see them*. Thus, where the witnesses signed in a room adjoining to the one which contained the testator's bed, upon a table opposite to the door of communication, it was holden to be sufficiently in the testator's presence.(x) So, also, where the testator executed his will in his carriage, and the witnesses signed their names in a room hard by, and the carriage being in such a situation as to enable the testator to see what was passing in the room, the will was held \*to be valid.(y) But if the testator could not possibly see the [ \*265 ] witnesses subscribe, as if they subscribe in another room out of sight, although by the testator's express directions, the execution will not be good: the design of the statute being to prevent a wrong paper from being intruded on the testator in the place of the true one.(z) And upon this principle, if the testator, between the time of his own subscription, and the subscription of the witnesses, lose his mental powers, it will invalidate the will, although signed in his presence.(a)

The clause of attestation generally expresses, that the witnesses subscribed in the presence of the testator; but such a statement is not absolutely necessary, and if omitted, the jury will not be concluded from finding that the will was duly subscribed, although all the witnesses are dead, and their signatures proved in the common way.(b)

(w) *Bond v. Seawell*, Burr. 1773. S. C. W. Blk. 407. B. N. P. 264

(e) *Shires v. Glasscock*, Salk. 688. *Davy v. Smith*, 3 Salk. 895.

(y) *Casson v. Dade*, 1 Bro. C. C. 89.

(z) *Eccleston v. Petty*, Carth. 79. *Brode-*

*rick v. Broderick*, 1 P. Wms. 289. *Machel v. Temple*, 2 Show 286.

(a) *Right, d. Cator v. Price*, Doug. 241.

(b) *Hands v. James*, Com 581. *Brice v. Smith*, Willes, 1 *Croft v. Pawlet*, Stran. 1109.

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Since the statute of wills, as well as before, a will may be construed in connexion with another instrument in writing to which it refers. *Jackson ex dem. Herrick vs. Babcock*, 12 Johns. Rep. 389.



With respect to the credibility of the attesting witnesses, it may be observed generally, that they must, at the time of their attestation, (c) have the use of their reason, (d) be sensible of the obligation of an oath, (e) and unconvicted of any infamous crime. (f) Formerly a devisee, taking a beneficial interest under the will, was considered not a credible witness to prove its execution within the intent of the \*statute ; (g) but doubts being entertained, whether his credibility might, not be restored by a release, payment, or extinguishment of all his interest, (h) it is enacted by the statute 25 G. II. c. 6., (after reciting that it had been doubted who were to be deemed legal witnesses within the statute of frauds,) "that if any person shall attest the execution of any will or codicil, (to whom any beneficial devise, legacy, estate, interest, gift, or appointment, affecting any real or personal estate, except charges on land, &c. for payment of debts shall be given,) such devise, legacy, &c. shall, so far only as concern such person attesting the execution, or any person claiming under him, be utterly null and void ; and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such devise, legacy, &c. And in case any will or codicil shall be charged with any debt, and any creditor, whose debt is so charged, shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act. Provided, always, that the credit of every such witness, so attesting the execution of any will or codicil, in any of the cases within this act, and all circumstances relating thereto, shall be subject to the consideration and determination of the Court and the jury, before whom any such witness shall be examined, or his testimony, or attestation made use of, in like manner as the credit of witnesses in all other cases ought to be considered and determined." [1] It seems, however, notwithstanding the pro-

(c) *Pendock, d. Mackinder, v. Mackinder*, Willes, 665.

(d) *Gilb Evid.* 109.

(e) *Hales, P. C.* 2 vol. 279—*Omichund v. Barker*, Willes, 588.

(f) 81 Geo. III. c. 35. *Chater v. Hawkins*, 3 Lev. 426.

(g) *Hilliard v. Jennings*, 1 Ld. Raym. 505. S. C. Com. Rep. 91

(h) *Vide Anstey v. Downing*, 2 Stran. 1253 *Wyndham v. Chetwynd*, 1 Burr. 414.

[1] The "*Revised Statutes*," Part 2 Chap. 6, Tit. 1. §§ 6, 50, 51, (*Vol.* 2, pp. 57, 65, 66,) contain the following regulations as to witnesses, to wills.

"§ 6. If by any will, any real estate be charged with any debt, and the

visions of this statute, that a married woman is not a credible witness to attest a will under which her husband takes a [\*267] beneficial interest.(i)[1]

The result of the foregoing inquiry seems to be, that in order to prove a will duly executed within the statute of frauds, it must appear that it was signed by the testator; that it was published by him in the presence of three or more credible witnesses, either at the same or different times; that the witnesses subscribed their names respectively in the presence of the testator; and that they all signed the same instrument.

To prove these facts, the original will should be produced, and one of the subscribing witnesses must be called to show that the solemnities

(i) *Bettison v Bromley*, 12 East. 250.

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creditor whose debt is no charge, shall attest the execution thereof, such creditor, notwithstanding such charge, shall be admitted as a competent witness, to prove the execution of such will."

"§ 50. If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate, shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest, or appointment, shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made.

"§ 51. But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, than so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them."

A devise or legacy to a witness is absolutely void; so that a conveyance by the devisee to a third person is inoperative. *Jackson ex dem. Denniston vs. Denniston*, 4 Johns. Rep. 311.

[1] If either husband or wife be a witness to a will, containing a devise or legacy to the other, such devise or legacy is void, and the party is a competent witness to the will. *Jackson ex dem. Cooder vs. Woods*, 1 Johns. Cas. 163. *Jackson ex dem. Beach vs. Durland*, 2 Johns. Cas. 314.

A grantor, with covenant of warranty, is a competent witness for his grantee in an action of Ejectment brought by the grantee for the recovery of the possession of the premises conveyed; although he would not be a competent witness to support the title of his vendee in an action against him for the premises by a third person. *Jackson ex dem. Montresor & Al. vs. Rice*, 3 Wend. Rep. 180.

required by the statute have been complied with. And if such witness can prove the whole execution, (as that the testator signed in the presence of himself and two other witnesses, or that he acknowledged his signing to each of them, and that each of the witnesses subscribed in his presence,) this will be sufficient proof of the will, without calling the others.[2] But if the witness who is called can only prove his own share of the transaction, as must happen where the testator acknowledged his signing to the witnesses separately, the other witnesses ought in that case to be called.(j)[3] If, also, the will is disputed by

(j) *Phillips' Evidence*, 3 Edit. 439.

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[2] One of the subscribing witnesses to a will, if he can prove all the solemnities required by the statute, is sufficient for the plaintiff; but if the witness called can only prove his own signature, other witnesses, if living, must be produced, or, if they are dead, their hand writing and that of the testator must be proved; and it is then a question of fact, whether, under all the circumstances, all the requisites of the statute have been complied with. *Jackson ex dem Le Grange vs. Le Grange*, 19 *Johns. Rep.* 386.

One of the subscribing witnesses to a will of lands, may prove its execution, on a trial at law. And this though the will be lost, or not produced in court. *Dan & Al. vs. Brown & Al.* 4 *Cowen's Rep.* 483.

And where a witness to a lost will proved its due attestation by three witnesses, but had forgotten the name of one of them, having no doubt, however, that he was a competent witness, this was holden sufficient. *Ibid.*

Proof by a subscribing witness that he, with two others, saw executed, and that they witnessed a will of land which he had seen at the Surrogate's office, which was identified with the one produced on the trial; though the witness was too dim of sight to see it at the trial; *Held* sufficient proof of the will on a trial at law. *Jackson ex dem. Henry vs. Thompson*, 6 *Cowen's Rep.* 178.

One claiming through deeds which recite a will is estopped to question its genuineness. *Jackson ex dem. Henry vs. Thompson*, 6 *Cowen's Rep.* 178.

Where the witnesses to a will were all dead, and one of them had signed the initials of his name, as his mark, and the testator had also signed his mark, and the hand-writing of two of the witnesses was proved; and a witness at the trial, in 1807, swore that he had seen the other witness make his mark, in the year 1760, to a paper in his possession, and that, from a comparison of the two marks, and from the peculiar manner in which one of the initial letters was made, he believed the mark affixed to the will was made by the witness to it; *Held*, that this was sufficient evidence of the execution of the will to permit it to be read to the jury, when accompanied with evidence of a possession by the devisees under the will, and of the declarations of one of the other witnesses, in his lifetime, as to the due attestation by all the witnesses. *Jackson ex dem. Van Dusen vs. Van Du-sen*, 5 *Johns. Rep.* 144.

[3] Where one of the witnesses to a will was called, and proved his

\*the heir at law, he is always entitled to the testimony of all [ \*268 ] the subscribing witnesses ; but then he must produce them himself, if the testimony of one is sufficient for the devisee. If, however, all the witnesses are dead, or insane or out of the jurisdiction of the court, proof of the handwriting of the deviser and witnesses, or of the deviser alone, if no proof of the handwriting of the witnesses can be obtained, will be sufficient without evidence of the solemnities.(k)[1]

(k) *Hands v. James*, Com. 531. *Croft v. Pawlet*, Stran. 1109.

own signature, and that of another subscribing witness, who was dead ; but the witness had lost all recollection of the facts and circumstances of the execution of the will, and had no knowledge of the testator ; *Held*, that this was not sufficient proof of the execution of the will ; but that the third subscribing witness, who was living, within the jurisdiction of the Court, ought to be produced. \* *Jackson ex dem. Le Grange vs. Le Grange*, 19 *Johns. Rep.* 386.

[1] To prove the execution of a will, it is not enough to account for the absence of the three subscribing witnesses, and prove the hand writing of one only ; but, under such circumstances, proof of the hand writing of all three of the witnesses, and that of the testator, would be proper to be left to the jury, from which to infer that the formalities required by the statute had been observed. *Jackson ex dem. Hunt & Al., vs. Luquere*, 5 *Cowen's Rep.* 221.

If the witness to a deed be dead, proof of his handwriting is sufficient. *Mott vs. Doughty*, 1 *Johns. Cas.* 230.

Hand-writing may be proved by witnesses from previous knowledge of the hand, derived either from having seen the person write, or from authentic papers received in the course of business. *Titford vs. Knott*, 2 *Johns. Cas.* 211. SAME POINT *Jackson ex dem. Van Dusen vs. Van Dusen*, 5 *Johns. Rep.* 144.

So, a person who had been accustomed to see the letters of the party, although he had never seen him write, may testify as to his belief that the hand-writing is the party's, from the knowledge which he had acquired from the correspondence. *Titford vs. Knox*, 2 *Johns. Cas.* 211.

A deed 44 years old, to which there were two witnesses, was allowed to be read in evidence, on proof of the hand-writing of one of the subscribing witnesses, and that he was dead, without any proof of the hand-writing of the other witness, or that he was dead or absent or could not be found, or that any inquiry had been made after him ; but there were strong circumstances in the case to induce a presumption, that he could not be found, or was dead, or beyond sea. *Jackson ex dem. Livingston vs. Burton*, 11 *Johns. Rep.* 64.

The rules and practice of the Courts leave this point with some latitude of discretion. (*Per KENT*, Ch. J) *Ibid.*

If there be two or more subscribing witnesses to a deed, the calling of one to prove the deed, has always been held sufficient. *Per Kent*, Ch. J. *Ibid.*

Where there were two subscribing witnesses to a paper, one of whom was

If the will be lost, an examined copy of it should be produced, or parol evidence be given of its contents; but \*the probate, under the seal of the Ecclesiastical Court, will not be admitted as such secondary evidence, because the Ecclesiastical Court has no control over devises of lands. (l) When also the will remains in Chancery, a copy of it will be good evidence. (m)

If a subscribing witness should deny the execution of the will, he may be contradicted as to that fact by another subscribing witness; (n) and even if they all swear, that the will was not duly executed, the devisee will be allowed to go into circumstantial evidence to prove its due execution. (o) So, also, if one of the subscribing witnesses im-  
[ \*270 ] \*peach the validity of the will on the ground of fraud, and accuse other witnesses, who are dead, of being accomplices in the fraud, the devisee may give evidence of their general character. (p)

When an ejectment is brought by the devisee of a copyholder, he must prove the admission of the testator, the surrender to the use of the will, and his own admittance. (q) And these facts will be sufficiently established, by producing the original entries on the rolls of the manor by the proper officer, (which entries the courts will compel the lord to permit his tenant to inspect, (r)) and proving the identity of the parties admitted; (s) without also showing a copy of such surrender and admittances stamp-

(l) *Doe, d. Ash, v. Calvert*, 2 Campb. 339.

(m) *Eden v. Chalkhill*, 1 Keb. 117.

(n) *Vide Alexander v. Gibson*, 2 Campb. 556.

(o) *Loose v. Jolliffe*, W. Blk. 365. *Pike v. Badmearing*, cited Stran. 1086. Gilb. Evid. 69. B. N. P. 264.

(p) *Doe, d. Walker, v. Stephenson*, 3 Esp. 284. S. C. 4 Esp. 50.

(q) *Roe, d. Jeffrey, v. Hicks*, 2 Wils. 13. *Doe, d. Vernon, v. Vernon*, 7 East, 8. *Ante*, 66.

(r) *Folkard v. Hamet*, W. Blk. 1061. *The King v. Shelly*, 3 T. R. 141.

(s) *Doe, d. Hanson, v. Smith*, 1 Campb. 197.

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proved to be dead, and the other living within the state, but too aged and infirm to attend the trial, proof of his hand-writing is inadmissible, as his examination under oath, taken under an order of the Court for that purpose, or under the statute, would be better evidence. *Jackson ex dem. Bond vs. Root*, 18 Johns. Rep. 60.

To warrant giving parol evidence of a will not shown to be destroyed, it must be first proved that diligent search for it has been made, by or at the request of the party interested, at the place where it is most likely it would be found; as among the papers of the devisor at his residence, if the will do not appear to have been deposited in any public office. *Dan & Al. vs. Brown & Al* 4 Cowen's Rep. 483.

ed, as required by the statute 55 Geo. III. c. 184.(t) The will of the deviser must likewise be proved; but as copyhold lands are not within the statute of frauds, it will be sufficient to show a will in writing,(u) although it be neither signed by the testator, nor attested by any witnesses.(v) Indeed, even short notes taken by an attorney for the purpose of drawing up a will, where the party died before the will could be completed, have been held sufficient to pass copyhold premises.(w)

It has been said, that any paper, which the Ecclesiastical Court would hold to be a will, shall be sufficient to pass a copyhold previously surrendered,(x) and it is, therefore, \*usual to produce [ \*271 ] the probate, as well as the original paper-writing; but this probate does not appear to be necessary, for it seems that the Courts of Common Law may enter into the question, whether the paper amounts to a will, although no probate has in fact been granted.(y)

If the lessor be the legatee of a term for years, he must give in evidence the probate of the will, and prove the assent of the executor to the devise; for where a person devises either specifically or generally, goods or chattels, real or personal, and dies, the devisee cannot take them without the assent of the executors.(z) He must also prove the title of the testator, and show that he had a chattel and not a freehold interest in the premises; because, when a party dies in possession, it is presumed that he is seised in fee until the contrary is shown.(a) This is most commonly done by the production of the lease: but in a late case, where the lessor put in an answer of the defendants to a bill in equity, in which the defendant stated, that "he believed the lessor was possessed of the leasehold premises, in the bill mentioned," it was held, as against the defendant, sufficient evidence that the interest of the testator was only a chattel interest.(b)

When an ejectment is brought by a personal representative, he must produce the probate of the will, or letters of administration, or the book of the Ecclesiastical Court, wherein they are entered, in addition to the proof of his testator's or intestate's title.(c)

(t) *Doe, d. Bennington, v. Hall*, 10 East, 206.

(u) 32 Hen. VIII. c. 1.

(v) *Nash v. Edmunds*, Cro. Eliz. 100.

*Doe, d. Cook, v. Danvers*, 7 East, 299.

(w) 1 Ander. 34. 85.

(z) *Carey v. Ashew*, 2 Bro. Cha. Rep. 53.

(y) *Doe, d. Smith, v. Smith*, Peake's Evid. 456.

(x) 1 Inst. 111 (a) *Ante*, 73.

(a) *Ante*, 262.

(b) *Doe, d. Digby, v. Steel*, 3 Campb. 115.

(c) *Garret v. Lister*, 1 Lev. 25. *Elden v.*

*Kedell*, 8 East, 187. Cont. B. N. P. 106.

[ \*272 ] \*When an ejectment is brought by the surrenderee of copyhold lands, he must prove the surrender to his use, and his subsequent admittance; but it is immaterial whether the admittance be before or after the day of the demise in the declaration.(d)

When the lessor of the plaintiff is the lessee for years of a copyholder, he must after proving his lessor's title, show either a special custom in the manor, allowing the copyholder to make leases for years, or that the licence of the lord was obtained before the lease was granted.(e)

When an ejectment is brought by a tenant by *elegit*, and the debtor is himself in possession of the land, the only evidence necessary is an examined copy of the judgment roll, containing the award of the *elegit*, and return of the inquisition. If, however, the possession is in a third person, the lessor must either show that such third person came into possession under the debtor, and that his right to the possession has ceased, or (should the party in possession hold adversely to the debtor) be prepared with evidence of his debtor's title.(f) It is not necessary in any case to prove a copy of the *elegit* and inquisition.(g)[1]

(d) *Ante*, 66.

(g) *Ramsbottom v. Brickhurst*, 2 M. & S. 565.

(e) Co. Copy. s. 51.

(f) *Doe, d. Da Costa, v. Wharton*, 8 T.

R. 2.

[1] In an Ejectment for premises, where the lessor of the plaintiff is the party in the original action in which the execution issues, he is bound not only to produce the writ of *Fieri Facias* under which the sheriff has sold, but likewise the judgment. *Doe ex dem. Bland vs. Smith*, 1 Holt's Rep. 589, 2 Starkie's Rep. 199.

It is no objection to the plaintiff's title that in the *Fi. Fa.* or *Venditioni Exponas*, under which the land was condemned and sold to him, the plaintiff was named as executrix of *William M'Dowell*, instead of *William Dowell*. It is only a clerical error, which would be amended at any time. *Cluggage & Al. vs. Lessee of Duncan*, 1 Serg & R. Rep. 111.

The sheriff's return to an *Elegit* stated that he had delivered an equal moiety of a house: *Held*, that this return was void for not setting out the moiety by metes and bounds, and that the objection might be taken at *Nisi Prius* to an Ejectment brought upon the *Elegit*. *Fenny ex dem. Masters vs. Durant*, 1 Barnew. & Ald. Rep. 40.

In an action of Ejectment by a purchaser under a sheriff's sale against the debtor, who refuses to give up the possession of the land, it is incumbent on the plaintiff to produce the judgment and the writ of *Fieri Facias*, and to prove the sale of the land, which may be done either by a deed from the sheriff, or a return of the *Fieri Facias*. They are sufficient to entitle him to recover. *Fenwick vs. Floyd's Lessee*, 1 Har. & Gill's Rep. 172.

The conusee of a statute merchant, when the debtor is in possession, must prove a copy of the statute, of the *capias si laicus*, extent and liber-

In the absence of a deed from the sheriff, and his return to the *Fieri Facias*, a memorandum in writing, of the sale, must be produced, to take the case out of the Statute of Frauds. *Ibid.*

A sheriff's return to a *Fieri Facias*, which states a levy on "part of a tract of land called," &c. is void for uncertainty, cannot be set up by matter *de hors* the return, and a sale under it passes no title. But a levy on "a tract of land called," &c. under a *Fieri Facias*, against a person who was seised of a part of such tract, and a sale under it, will pass his interest to the purchaser. *Thomas's Lessee vs. Turvey*, 1 Har. & Gill's Rep. 435.

In an action of Ejectment brought by a purchaser under a sheriff's deed against the defendant in the execution, the defendant cannot question the title. The plaintiff need show only the judgment, execution and the sheriff's deed. The sheriff stands in the situation of the attorney of the party, appointed by law to sell and convey, and his deed stands on the same footing with the deed of the party himself. *Cooper's Lessee vs. Galbraith*, 3 Wash. Circ. Ct. Rep. 546.

Under the act of the 3d of April, 1804. [*Pennsylvania*] for selling unseated lands for taxes, the title given by the sheriff is good after five years have elapsed from the sale without action being brought, whether the proceedings were regular or irregular; and that notwithstanding the sale was for taxes due before the passing of the act, and the purchaser had not entered on the land. *Parish & Al. vs. Stevens*, 3 Serg. & R. Rep. 298.

On a sale of unseated lands for taxes, if no tenant be on the land, the law will presume the purchaser for taxes to be in possession; and if he will not appear and defend his title judgment will be given against him. *Ibid.*

A difference between the sheriff's deed, and the levy, *Venditioni Expositas*, and conditions of sale, in stating the number of acres contained in a tract of land is unimportant. *Arnold & Al. vs. Gorr & Al.* 1 Rawle's Rep. 223.

Though the conditions of sale are not essential to support an Ejectment by the sheriff's vendee, yet being part of the *res gesta*, they are admissible in evidence. *Ibid.*

If the recital of executions in a sheriff's deed of land describe them correctly in several particulars, but add others which are inaccurate, the latter may be rejected as surplusage. All that is necessary is, that the deed show that the sheriff acted under the authority of the execution, even admitting a recital to be important. *Jackson ex dem. Witherell & Al. vs. Jones*, 9 Cowen's Rep. 182.

But the execution need not be set forth or recited in a sheriff's deed; and if recited and described inaccurately, the variance will not affect the deed. *Ibid.*

The record of a judgment, sheriff's sale thereon, sheriff's deed, and *mesne* conveyances to the party offering them, are not evidence, where no interest in the land sold by the sheriff, is shown in the defendant in the judgment. *Arnold & Al. vs. Gurr & Al.* 1 Rawle's Rep. 223.

A defendant whose property has been sold by the sheriff, cannot defeat



ate returned ; for although by the return of the extent an interest is vested in the conusee, yet the actual possession of that interest is acquired

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the purchaser in obtaining possession, by connecting himself with one who may have a good title. *Ibid.*

*Quere.* Whether in general, possession is notice of a claim. *Evvert & Al. vs. Irwin & Al.* 3 *Serg. & R. Rep.* 283.

But if there be a sale of land by the sheriff, as the property of *A.* ; and *B.*, who is in possession. stand by, knowing that he is represented as the tenant of *A.*, and do not contradict it, he cannot afterwards contest the title of *A.* with the purchaser. *Ibid.*

Where both plaintiff and defendant in Ejectment claim under a sale of unseated lands for taxes, the plaintiff is entitled to recover, without direct proof of the title being out of the commonwealth. *Stewart vs. Shoenfelt*, 13 *Serg. & R. Rep.* 360.

The statute 1783, c. 44. § 3. [*Connecticut.*] prohibits sheriff's from making or filling up any plaint, declaration, writ, or process, and provides, that "all such acts done by either of them shall be void." A writ and declaration were written by a deputy sheriff ; an attachment of land upon the writ, and the land seasonably set off on an execution issued on a judgment recovered in the suit. Subsequently to the attachment, and previously to the judgment, the debtor conveyed the land to a *bona fide* purchaser for a good consideration. It was *Held*, that this conveyance defeated the attachment, and that the title of the purchaser was good against the judgment creditor. *Smith vs. Saxton*, 6 *Picker. Rep.* 483.

*It seems*, that as between the parties, the judgment is good. *Ibid.*

Where a title is claimed under a sheriff's sale, it is indispensable to produce the judgment on which the execution issued. *Smith vs. Moorman*, 1 *Monroe's Rep.* 154.

If by reason of unlawful charges, too much land is taken and set off to the creditor, the proceeding, being an entire and indivisible act, is wholly void. *Beach & Al. vs. Walker*, 6 *Connect. Rep.* 190.

Where the execution debtor refused to choose an appraiser ; and the creditor, without the concurrence of the debtor, appointed the three appraisers ; and the officer thereupon proceeded to set off the land levied upon, and stated in his return, that the appraisers were mutually agreed on by the creditor and the debtor ; it was *Held*, in an action of Ejectment for the land, brought by the devisees of the creditor against the debtor, that these facts evinced a fraudulent combination between the creditor and the officer, by reason of which the creditor acquired no title to the land. *Watson & Al. vs. Watson*, 6 *Connect. Rep.* 334.

Where the defendants in Ejectment come into possession as tenants of the person as whose property the land in dispute was sold by the sheriff, under a judgment confessed by him, they cannot set up, as a defence, a mortgage and release of the equity of redemption, given to one of them by the defendant in the judgment. *Eisenhart & Al. vs. Slaymaker*, 14 *Serg. & R. Rep.* 153.

by the *liberate*.(h) The same proofs are also necessary when a \*third person is in possession, as in the case of a tenant by *elegit*. [ \*273 ]

When a parson brings ejectment for the parsonage-house, glebe, or tithes, he must prove his admission, institution, and induction;(i) but he need not show a title in his patron, for institution and induction, although upon the presentation of a stranger, are sufficient to put the rightful patron to his *quare impedit*.(j)

Proof was also formerly required that he had read and subscribed the thirty-nine articles, according to the statute, and declared his assent and consent to all things contained in the book of Common Prayer; but this is no longer held to be necessary, unless some ground be laid by the defendant to show that he has not complied with these requisites; because the presumption is, that every man has conformed to the law, until there be some evidence to the contrary.(k)

Entries made by a deceased rector in his books, may be given in evidence by his successor,(l) upon a question of tithes; and he is also entitled to give in evidence such terriers as have been regularly made and preserved in the proper repository; that is to say, such terriers as are signed by a churchwarden, or (if the churchwardens are nominated by the parson) by some of the substantial inhabitants of the parish,(m) and are found either in the bishop's register office,(n) or in the registry of the archdeacon of the diocese.(o) \*It is not necessary that the terrier should be signed by the parson; but, unless it possesses the marks of authenticity above mentioned, it cannot in general be received in evidence. But where a terrier was found in the registry of the dean and chapter of Litchfield, it was admitted in evidence against one of the prebendaries upon the principle, that there appeared to be a proper connexion between the terrier and the place where it was found.(p)

An ejectment for a parsonage and glebe, will not be supported by

(h) *Hammond v. Wood*, 2 Salk. 568.

(i) *Snow v. Phillips*, 1 Sid. 220.

(j) B. N. P. 105.

(k) *Powel v. Milburn*, 3 Wils. 355. S. C. 2 W. Black. 851.

(l) *Glyn v. Bank of England*, 2 Ves. 88.

43. *Roe, d. Brune, v. Rawlings*, 7 East, 279. 290.

(m) B. N. P. 248. *Earl v. Lewis*, 4 Esp. 2.

(n) *Atkins v. Hatton*, 4 Gwill. 1406.

(o) *Potts v. Durant*, 4 Gwill. 1450, 1454.

(p) *Miller v. Foster*, 4 Gwill. 1406.

showing that the defendant entered and took the tithe belonging there-to; because the tithes and the rectory are not the same.(g)

When a lay impropiator brings an ejectment for tithes, the strict proof of title is to show, that the rectory originally belonged to one of the dissolved monasteries, and was granted by the crown to those under whom he claims;(r) but, as deeds and instruments are liable to be lost, length of possession, and old deeds conveying tithes, have been deemed sufficient evidence of title.(s)

When an ejectment is brought by a guardian in socage, he must prove, in addition to the title of his ward, that he (the ward) is under fourteen years of age;(t) and upon the same principle, when a testamentary guardian is the lessor, he must show the age of his ward to be less than twenty-one years.

When the assignees of a bankrupt are the lessors of the [ \*275 ] \*plaintiff, they must give evidence of the assignment, bankruptcy, &c. in the same manner, and subject to the same rules, as in other actions.(u) They must likewise prove the bankrupt's title to the premises; and, if the lands are freehold, the bargain and sale, and enrollment thereof;(v) and, also, if his title accrued after his bankruptcy, a special conveyance of them by the commissioners to the assignees.(w)

Where several lessors declare upon a joint demise, proof of a joint interest in the whole premises must be given. But, if a demise is laid by each of several lessors separately, they will be entitled to recover, whether they have a joint or several interest, for a several demise severs a joint tenancy.(x)[1] And in a case where a joint demise was laid by

(g) *Hem v. Stroud*, Latch. 61.

(r) *Vide* Com. 651.

(s) *Kinaston v. Clarke*, 5 T. R. 265, in notes.

(t) *Doe, d. Rigge, v. Bell*, 5 T. R. 471.

(u) 49 Geo. III. c. 121.

(v) *Exp. N. P.* 481. 488.

(w) *Ante*, 69.

(x) *Doe, d. Marsack, v. Read*, 12 East, 57.

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[1] A person who has entered by permission of one tenant in common, (a partition having been made,) cannot set up an adverse title in bar of an action of Ejectment by the tenant in common, to whose share the premises had fallen. *Jackson ex dem. Fisher vs. Creal & Al.* 13 Johns. Rep. 116.

A. and B., tenants in common, having agreed to divide their property, and that *Blackacre* should belong to A.; the occupier of *Blackacre*, who,

seven trustees of a charity, who were appointed at different times, and the tenant had paid one entire rent to the common clerk of the trustees it was held that such payment of rent should enure in the most beneficial way for the trustees in support of their title as brought forward by themselves, unless the defendant expressly proved them to be entitled in a different manner. And it was considered \*that [ \*276 ] the circumstance of their being appointed at different times was not sufficient evidence for that purpose.(y)

When an ejectment is brought by one joint-tenant, parcener, or tenant in common, against his companion, the lessor may be called upon to produce the consent rule, and if it appear that a special one has been granted, that the defendant shall confess lease and entry only, the lessor must prove an actual ouster by his co-tenant;(z)[1] but if the consent rule be in the common form, it will be sufficient evidence of an ouster.(a)

Next, of the proofs required when a privity exists between the defendant and lessor of the plaintiff, or those under whom he claims.

When a privity exists between the parties to the ejectment, the claimant, instead of proving his title, should show the existence and termination of the privity; for a privity will not be presumed to exist without proof, but being proved, the presumption is in favour of its continuance. Thus, if the defendant be let into possession, pending a negotiation for a purchase or a lease, proof must be given of the circumstances under which he was let into possession, and also of the breaking off of the negotiation before the day of the demise in the ejectment. In like manner, if he has become tenant at will of the premises, the lessor must

(y) *Doe, d. Clarke, v. Grant*, 12 East, 221.

(z) *Ante* 56.

(a) *Doe, d. White, v. Cuff*, 1 Camp. 173.

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after this agreement, had paid his whole rent to A., cannot, in an Ejectment brought against him by A., object that the partition deed between A. and B. is not executed. *Doe ex dem. Prichett vs. Mitchell*, 1 *Brad. & Bingh. Rep.* 11.

[1] One tenant in common may maintain Ejectment against his co-tenant, though no actual ouster be proved. (*Per* SPENCER, J.) *Shepherd vs. Ryers*, 15 *Johns. Rep.* 501.

But it appears that this must mean an ouster *in fact*, not an ouster *in law*. & Vide "*Revised Statutes*," Part 3, Chap. 5, Tit. 1, § 27. (*Vol. 2, p. 308.*) Cited ANTE Page 236, n. [2.]

show how he became so, and that the will was determined by demand of possession or otherwise, and so forth.(b)

[ \*277 ] \*When the relationship of landlord and tenant regularly subsists between the parties, or those under whom they claim, which is commonly the case in ejectments of this nature, the tenancy may be determined, as we have already observed,(c) in three several ways. First, by the efflux of time, or the happening of a particular event. Secondly, by a notice from the landlord to the tenant to deliver up the possession, or *vice versa* ;[1] and thirdly, by a breach on the part of the tenant of any condition of his tenancy, as by the non-payment of rent, or non-performance of a covenant.

When the tenancy is determined by the efflux of time, the lessor has only to prove the counterpart of the lease,(d) (for which purpose he must call one of the subscribing witnesses, if capable of being called,) provided the demise be by deed, or the agreement by some person present at the making of it, if it be by parol : and it is not necessary for him also to show, that he, or those under whom he claims, has received the reserved rent within the last twenty years.(e)

[ \*278 ] Where the tenancy is determined by the happening of a \*particular event, the lessor must, of course, also prove that the event upon which the tenancy is to determine, has happened.

(b) *Ante* 98. 111.—In a case where the landlord by his own negligence suffered a third person to recover in ejectment against his tenant, who held under a lease, and who attorned to such third person, the court of Chancery restrained the tenant from setting up the lease against an ejectment about to be brought by his landlord, although only one

year and three quarters of the term was unexpired.—*Baker v. Mellish*, 10 Ves 544. *et vide Doe, d. Powell, v. King, Forrest*, 19.

(c) *Ante* 101.

(d) *Koe, d. West, v. Davis*, 7 East, 363.

(e) *Orrell v Maddox*, Rann. Eject. Appendix, 458.

[1] A tenancy at will is held to be a tenancy from year to year, merely for the purpose of a notice to quit. *Bradley vs. Covel*, 4. *Cowen's Rep.* 349.

A shorter notice (*e. g.* 3 months,) will terminate the tenancy ; but in such case, where the holding is at a stated rent, the notice turns the tenancy at will into a tenancy from year to year, running from the expiration of the first notice, in order to warrant an Ejectment ; and the holding over upon the tenancy from year to year is at the former rent. *Ibid.*

Where the tenant holds over after such notice, without any new stipulation, the law implies an agreement that it should be at the former rent. *Ibid.*

When the tenancy expires by reason of a notice to quit, the lessor must prove the tenancy of the defendant, the service of the notice and its contents, (and if given by an agent, the agent's authority,) and that the notice and the year of the tenancy expire at the same time. When also the notice is for a shorter period than half a year, or expires at any other period than the end of the year of the tenancy, it will be necessary to show the custom of the country where the lands lie, or an express agreement, by which such notice is authorized. (f)

The tenancy of the defendant is commonly admitted, and may be proved when necessary, if no direct evidence can be given of the demise, by declarations on the part of the tenant, the fact of payment of rent, (and it is advisable to give the tenant notice to produce his receipts,) or the like.

The service of the notice, and the authority to serve it, \*will [ \*279 ] be proved by the person who delivered it to the tenant; but if there is a subscribing witness thereto, such subscribing witness must also be called, although it should happen that he only witnessed the signature of the landlord, and did not deliver the notice himself. The contents of the notice may be proved by a duplicate original, which should be compared with the notice actually served, by the party serving it; but if this precaution is not taken, parol evidence may be given of its contents; and it is not necessary in either case, to give the defendant notice to produce the original in his possession. (g)

When the notice is given by an agent, it must be shown that he was vested with his authority at the time the notice was given. (h) And where two or more joint tenants, &c. are lessors of the plaintiff, and a notice to quit is given by one or more in the name of all, although they all afterwards join in an ejectment, it will not be presumed, from that circumstance, that an authority was originally given by the parties not joining in the notice, to their co-tenants. (i) But where a notice to quit was given by the steward of a corporation, it was presumed, inasmuch as he was an officer of the corporation, that he had an authority to give the notice. (j)

When the tenant has been long in possession of the premises, it frequently becomes extremely difficult to prove the time of his original en-

(f) *Ante* 181.

(g) *Jory v. Orchard*, 2 B. & P. 41.

(h) *Ante* 120.

(i) *Right, d. Fisher, v. Cuthell*, 5 East, 491. *Ante*, 120.

(j) *Roe, d. Dean of Rochester, v. Pearce*, 2 Campb. 96.

try; but nevertheless, some evidence must be given, from which the jury may presume that the time of the expiration of the notice, [ \*280 ] and of the \*year of the tenancy are the same, or the plaintiff will be nonsuited.

If the tenant has been applied to by his landlord, respecting the time of the commencement of his tenancy, and has informed him that it began on a certain day, and, in consequence of such information, a notice to quit on that day is given at a subsequent period, the evidence is conclusive upon the tenant, and he will not be permitted to prove that, in point of fact, the tenancy has a different commencement: nor is it material whether the information be the result of design or ignorance, as the landlord is in both instances equally led into an error.(k) When also the tenant, at the time of the service of the notice, assents to the terms of it, he will be precluded from showing that it expires at a wrong time. But such assent must be strictly proved; and in a case where the party made no objection to the notice at the time of its delivery, but said, "I pay rent enough already, it is hard to use me thus;" it was held, that these circumstances were not sufficient to prevent him from showing the time when the tenancy actually commenced.(l)

When a notice to quit upon any particular day, is served upon the tenant personally, if he read its contents, or they be explained to him, without any objection being made on his part, as to the time of the expiration of the notice, it will be *prima facie* evidence of a holding from the day mentioned in the notice.(m) In like manner a receipt for [ \*281 ] a year's rent up to a particular day, is *prima facie* evidence \*of a holding from that day.(n) But if the notice be not delivered personally, or be not read over or explained to the party, no such presumption will arise, although a contrary doctrine was formerly maintained.(o) When also the notice is to quit generally at the expiration of the current year of the tenancy, &c.(p) no presumption can arise, as to the time of the commencement of the tenancy, from a personal delivery to the tenant. But where a general notice was delivered on the 22d of March, to quit at the expiration of the current year, &c., and on the

(k) *Doe, d. Eyre, v. Lambley*, 2 Esp. 406.

(l) *Oakapple, d. Green, v. Copous*, 4 T. R. 361.

(m) *Thomas, d. Jones, v. Thomas*, 2 Campb. 647. *Doe, d. Clarges, v. Foster*, 13 East, 406.

(n) *Doe, d. Castleton, v. Samuel*, 5 Esp. 174.

(o) *Doe, d. Puddicombe, v. Harris*, 1 T. R. 161. *Doe, d. Ash, v. Calvert*, 2 Campb. 337.

(p) *Ante*, 182.

16th of January following, a declaration in ejectment was delivered to the tenant, laying the demise on the 1st of November, and the tenant on the receipt of this declaration made no objection to the notice to quit, nor set up any right to the possession of the premises, but said he should go out as soon as he could suit himself with another house, it was ruled by Lord *Ellenborough*, C. J., that the defendant's declaration, when served with the ejectment, was evidence to go to the jury, whether the holding was a Michaelmas holding, and the jury found a verdict for the landlord.(q) And in a case, where the notice was delivered on September 27, to quit "at the expiration of the term for which you hold the same," which notice was served personally upon the tenant, who observed, "I hope Mr. M. does not mean to turn me out." *Holroyd*, J. permitted the lessor to prove, that it was the general custom, in that part of the county where the demised lands lay, to let the same from Lady-day to Lady-day, and that the defendant's rent was due at Michaelmas and Lady-day respectively, and direct-\*ed the [ \*282 ] jury to presume, that this tenancy, like other tenancies in that part of the country, was a tenancy from Lady-day to Lady-day.(r)

When the ejectment is brought upon a clause of re-entry for non-payment of rent, if the proceedings are at common law, the lessor must prove the lease or counterpart.(s) and that the rent has been demanded with all the formalities mentioned in the preceding chapter.(t) If the case falls within the provisions of the statute 4 Geo. II. c. 28. instead of proving a demand of rent, he must show that six months rent is in arrear, and that there is not a sufficient distress upon the premises.(u) In order to prove the latter fact, evidence must be given that every part of the premises has been searched; and in a case where a party who was about to make the distress, omitted to enter a cottage upon the premises, the Court considered the search insufficient.(v) But where the rent was payable on the 25th of March, with a proviso, that the right of re-entry should accrue, if the rent remained unpaid *by the space of fourteen days next after* it became payable, and the lessor proved that there was no distress upon the premises *some day* in May, (the demise being laid on May 2,) the Court held this to be sufficient *prima facie* evidence to

(q) *Doe, d. Baker, v. Wombwell*, 2 Campb. 539.

(r) *Doe, d. Milnes, v. Lamb*, Nottingham Summer Assizes, 1817—MS.

(s) *Roe, d. West, v. Davis*, 7 East, 368.

(t) *Ante*, 149.

(u) *Ante*, 150.

(v) *Doe, d. Powell, v. King, Forrest*, 19.



call upon the defendant to show, that there was sufficient distress upon the premises within the terms of the proviso.(w)

When the ejectment is for the breach of any other covenant, [ \*283 ] the lessor must show the covenant broken, by the \*same evidence as in an action of covenant; and if he has been ordered by the Court to give to the tenant particulars of the breaches upon which he means to rely, he will be precluded from giving in evidence different breaches from those contained in the particulars. In a case where the ejectment was upon a proviso for re-entry if the lessee should assign or underlet, it was ruled by Lord *Alvanley*, C. J., that if a person was found in possession, acting and appearing as tenant, it was sufficient *prima facie* evidence of an underletting, to call upon the defendant, (the lessee,) to show in what character such person was upon the premises; and that the declarations of such person were admissible in evidence against the lessee.(x)

If the claimant is the assignee of the reversion, after proving the forfeiture, evidence must be given that he was entitled to the reversion at the time the forfeiture was committed,(y) and if possible, of the mesne assignments from the original lessor. These mesne assignments, however, will be presumed, if the original lease be for a long term, and the possession of the assignee have continued for a considerable time.(z)

When the ejectment is brought for the forfeiture of a mortgage,[1] if

(w) *Doe, d. Smelt, v. Fuchau*, 15 East, 286.

(z) *Earl, d. Godwin, v. Baxter*, W. Black. 1228.

(x) *Doe, d. Hindley, v. Rickarby*, 5 Esp. 4.

(y) *Ante*, 74.

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[1] An Ejectment may be supported on a mortgage, before all the instalments become due. *Smith & Al. surviving Executors, vs. Shuler & Al.* 12 *Serg. & R. Rep.* 240.

In Ejectment by a mortgagee against a judgment creditor of the mortgagor, who bought the land under a sale on his judgment, evidence is admissible that the defendant was present at the sale, knew of plaintiff's mortgage (which was given before the judgment, though not recorded till after) and that the sheriff expressly sold the land subject to the mortgage. *Muse vs. Letterman*, 13 *Serg. & R. Rep.* 167.

Where judgment has been obtained in a *Scire Facias* on a mortgage, evidence is not admissible afterwards in an Ejectment to show payment of the mortgage debt prior to the judgment. *Blythe vs. M'Clintic*, 7 *Serg. & R. Rep.* 341.

In Ejectment by the mortgagee the defendant may prove by parol that

the mortgagor is the defendant, the mortgage deeds are the only evidence required, because a man cannot set up any title inconsistent with his own deed. And if the ejectment be against a third person, who holds the mortgaged lands as tenant to the mortgagor, or mortgagee, it will be only necessary in addition to the proof of the mortgage deeds, to give evidence of such tenancy, and either of its \*re- [ \*284 ] gular determination, or of the mortgagor himself having been in possession of the lands at the time of the mortgage, and of the tenancy being unacknowledged by the mortgagee. (a) If, however, such third person hold the lands by a title adverse to that of the mortgagor, evidence of the mortgagor's title will of course be required.

(a) *Keech v. Hall*, Doug. 21. *Thunder*, d. *Wright*, 1 T. R. 378. *Ante*, 106. *Weaver v. Belcher*, 3 East, 449. *Birch v.*

the mortgage debt is paid, which is a good defence to the action. *Jackson ex dem. Roosevelt vs. Stackhouse*, 1 Cowen's Rep. 122.

In Ejectment by a mortgagee to recover premises sold under a judgment on his mortgage, evidence is not admissible to show that the *Scire Facias* on the mortgage which was returned served, was not served.

Nor is evidence admissible to show, that mortgage money for which judgment was recovered by default, was paid. *Blythe & Al. vs. Richards*, 10 Serg. & R. Rep. 261.

In an action of Ejectment, evidence of usury in the consideration of a mortgage deed, by virtue of which the plaintiff claimed title, was held to be admissible, as a defence, under the general issue, without notice. *Holton vs. Button & Al.* 4 Connect. Rep. 436.

A general notice of usury, without stating therein the facts relied on, in a case in which notice is necessary, is insufficient. *Ibid.*

By deed, a mortgagee conveyed to the mortgagor the legal estate on being paid the mortgage money, and the latter reconveyed it to trustees for the purpose of securing an annuity. At the time of the execution by the mortgagee there were several blanks in the deed, but not in that part which affected him. The blanks left were for the sums to be received by the mortgagor from the grantees of the annuity, and were all filled up at the time of the execution of the deed by the mortgagor; but several interlineations were made in that part of the deed, after the execution by the mortgagee. It was held that the deed was not therefore void, but operated as a good conveyance of the estate from the mortgagor to the trustees for the payment of the annuity. *Doe ex dem. Lewis & Al. vs. Bingham*, 4 Barnew. & Ald. Rep. 672.

*Held* also, that it was not incumbent on the plaintiff in Ejectment, brought on this deed, to prove that the annuity was duly enrolled. *Ibid.*

*Held*, also, that the tenant in possession was not competent to prove that the witness, and not the defendant, was the possessor of the lands. *Ibid.*

When the lord of a manor brings an ejectment for a forfeiture, he must prove that he was lord at the time of the forfeiture committed, and that the person, who is alledged to have committed the forfeiture, has been admitted tenant on the rolls of the manor. Proof of the admittance of the father, and of the descent to the copyholder as son and heir, and payment of quit-rents by him, will not be sufficient evidence: the tenant must be himself admitted, for nothing vests in a copyholder which he can forfeit, before admittance and entry. The act of forfeiture must of course also be proved; but proof is not required of the presentment of the forfeiture, nor of the entry, or seisure of the lord.(b)

When the lord seises the land as forfeited *pro defectu tenentis*, if he seise *absolutely*, he must prove a special custom in the manor entitling him to do so; but if the seise only *quousque*, the custom need not be proved, and an absolute seisure unwarranted by the custom, cannot afterwards be set up as a seisure *quousque*.(c) He must also prove, that [ \*285 ] the regular proclamations have been made, and in one \*report of Lord Salisbury's case, it is said, that the proclamations must be proved by *viva voce* evidence, and that the entry thereof on the Court rolls is not sufficient;(d) but no mention is made of this point in another report of the same case,(e) nor does it appear in a late similar decision, that any evidence of this nature was required.(f)

A lord of a manor cannot maintain ejectment for mines upon his manor, without proof that he has been actually possessed of them within the last twenty years; because they are a distinct possession from the manor, and may be of different inheritances.(g) And a verdict in trover, for lead dug out of them, will not be evidence of the possession of the mines; for trover may be brought on property without possession.(h)

The doctrine of presumption extends to copyhold lands, and upon proper evidence an enfranchisement of them may be presumed even against the crown.(i)

(b) *Roe, d. Jaffreys, v. Hicks*, 2 Wils. 13.  
*Doe, d. Foley, v. Wilson*, 11 East, 56. B. N.  
 P. 168. *at vide* Walk. Copy. v. i. 324 to 353.

(c) *Lord Salisbury's case*, 1 Lev. 68. S. C.  
 1 Keb. 237—*Doe, d. Tarrant, v. Hellier*, 3 T.  
 R. 162.

(d) 1 Keb. 237.

(e) 1 Lev. 68.

(f) *Doe d. Tarrant. v. Hellier* 3 T. R. 162.

(g) *Rich v. Johnson*, Stran. 1142.

(h) B. N. P. 102.

(i) *Roe. d. Johnson, v. Ireland*, 11 East.  
 280.

## Secondly, Of the evidence on the part of the defendant.[1]

[1] In Ejectment by an heir at law, against a defendant who claims under a lease granted by an ancestor of the lessor of the plaintiff; if such lease, being in the hands of the lessor of the plaintiff, be produced at the trial by him, on notice, it may be given in evidence, without proof of its execution by the subscribing witness. *Doe ex dem. Tindale vs. Hemming & Al.* 2 *Curr. & P. Rep.* 462.

One in possession, though of a part only of the premises in Ejectment, is not a competent witness for the defendant. *Jackson ex dem. Church vs. Hills*, 8 *Cowen's Rep.* 290.

A party in possession may protect himself under a title acquired by a person under whom he claims, subsequently to his coming into possession. *Jackson ex dem. Humphrey & Al. vs. Given & Al.* 8 *Johns. Rep.* 137.

*A.*, a patentee of land, conveyed to *B.*; afterwards, *C.* purchased the same lot of a person pretending to be the original patentee, and fraudulently executed a deed for the lot to *C.*, who afterwards conveyed it to *D.*, who sold it to various persons, who took possession under him; the real patentee, during the continuance of the adverse possession, executed another deed of the same lot to *W.*, which was first recorded; and *D.* purchased the title of *W.*, and took a deed from him, which was also recorded. *B.* brought an action of Ejectment against the person in possession under *D.*, and it was *Held.* that *B.* could not set up the adverse possession of *D.*, to defeat *W.*'s purchase from the real patentee, and that the persons holding under *D.* had a right to protect themselves by the title of *W.*, equally, as if they had purchased it of *W.* *Ibid.*

*A.* claimed title under *J. S.*, and *B.* also claimed title under a deed from *J. S.* and others, as trustees of the town of *R.*, settling the boundaries of certain disputed premises: *Held.* that *J. S.* was bound, in his individual capacity, to the line so agreed to and settled by him as a trustee, and which he had covenanted to maintain, and that such deed of settlement, being prior to the deed to *A.*, was a bar to his claim. *Wood ex dem. Elmendorf vs. Livingston*, 11 *Johns. Rep.* 36.

The defendant derived his title from *A.*, who derived it from *B.*; *Held.* that the defendant could not give in evidence the declarations of *A.* and *B.*, as to the loss of the deed from *B.* to *A.*, nor could he prove a parol exchange between *B.* and *A.* *Jackson ex dem. Watson vs. Cris*, 11 *Johns. Rep.* 437.

Where a person having no title to land, conveys to another, and afterwards purchase a title to the same land, he is estopped from maintaining an action against his grantee for the land, but the title subsequently acquired will enure to the benefit of his grantee, and in confirmation of his title. *Jackson ex dem. Stevens vs. Stevens*, 13 *Joans. Rep.* 316. *SAME POINT*, *Jackson ex dem. Preston vs. Smith*, 13 *Johns. Rep.* 406.

A person in possession of land, claiming title, may purchase in an outstanding title, to protect his possession. *Jackson ex dem. Preston vs. Smith*, 13 *Johns. Rep.* 406.

Though parol declarations of tenancy have been admitted, yet parol declarations are inadmissible evidence to defeat or take away a title; it being contrary to the statute of frauds. *Jackson ex dem. White vs. Cary*, 1 *Johns. Rep.* 302.

The principle that a claimant in ejectment must recover on the strength of his own title, is now so clearly established that little can be said respecting the evidence necessary on the part of the defendant. The lessor of the plaintiff must always, in the first instance, make out a clear and substantial possessory title to the premises in question; [2]

In an action of Ejectment brought by the grantee in a mere voluntary conveyance, against the heir of the grantor, the latter cannot set up the want of consideration, in bar of the recovery; for the party making a voluntary conveyance, and his heirs, are bound by it. *Jackson ex dem. Malin vs. Garnsey*, 16 Johns. Rep. 189.

The heir of a grantor cannot take advantage of a judgment against himself, under which the land conveyed by his ancestor had been sold, and set it up as an outstanding title to defeat the grantee's action; for such a sale operates only on the interest which he had in the land, which was nothing more than a naked possession. *Ibid.*

In Ejectment against a person who has forcibly entered upon and taken possession of land; *It seems*, that the defendant is not precluded from setting up a title in himself or a third person, in bar of the action. *Jackson ex dem. Seelye vs. Morse*, (Per SPENCER, J.) 16 Johns. Rep. 197.

Where the lessor of the plaintiff, who became the purchaser of the title of a mortgagor in possession of land, under a judgment and execution, had covenanted with the defendant to postpone the sale under the execution for two years, it is no defence in an action of Ejectment, that the sale to the lessor had been made before the expiration of the two years, and in violation of his covenant. *Jackson ex dem. Randall & Al. v. Davis*, 18 Johns. Rep. 7.

An equitable title is not available in an action of Ejectment, to defeat the legal title. The latter alone is in question. *Sinclair vs. Jackson ex dem. Field*, (IN ERROR,) 8 Cowen's Rep. 543.

If no evidence be given to prove the possession of one of the defendants in Ejectment, the court may direct the jury to find him not guilty, that he may be examined as a witness for the other defendants. *Lessee of Leaming vs. Case*, Circ. Ct. U. S. P. Oct. 1821. MS. (Cited in Coxe's Digest, 272.)

Where in Ejectment, the attorney for the lessor of the plaintiff obtained from one of the defendants, (the tenant in possession,) a lease of the premises granted to him, for a term not then expired, in order to prevent the defendant's setting it up to defeat the action: *Held*, that he thereby recognized it as a valid instrument, and when produced in pursuance of notice from the defendants, it might be read without calling the subscribing witnesses to prove the execution by the grantor of the lease. *Doe ex dem. Tyndale vs. Hemming & Al.* 6 Barnew. & Cress. Rep. 28.

[2] Articles of agreement for sale of land, stipulating that title shall be made on payment of the money, do not prevent a recovery in ejectment, there being no proof of payment. *Anonymous*, 1 Hayw. Rep. 331.

The plaintiff in Ejectment in deducing his title to the land in question, gave in evidence a grant for the land in 1671 to T. P. and R. B., and that

and the defendant's evidence is altogether confined to falsifying \*his adversary's proofs, or rebutting the presumptions which [ \*286 ] may arise out of them. He needs not show that he has himself any claim whatever to the premises, nor even give evidence of a title in a third person; it is sufficient if he make it appear to the jury, that a legal and possessory title does not subsist in the plaintiff's lessor. Thus, when the lessor claims as heir, he may show a devise by the ancestor to a stranger; [1] that by a particular custom another, and not the claimant, is the heir; [2] that the claimant is a bastard; or any oth-

*T. R.* was seised and possessed of the land, and died so seised in 1746, having by his will in 1744, devised the land in tail to his son *F. R.*, after his mother's death. *F. R.*, in 1780, being in possession, conveyed the land to *B. G.*, who died intestate in 1800, leaving six children, one of whom conveyed all his interest to the lessor of the plaintiff. Held, that the life estate set up to defeat the action, must, from the length of time that had elapsed, (1746 to 1808,) be considered as having expired before the Ejectment was brought, and that the plaintiff was entitled to recover. *Stevenson vs. Howard, Survivor of Pennington's Lessee*, 3 Har. & Johns. Rep. 554.

[1] In Ejectment, by the heirs at law of *C.* against *L.*, who had taken a lease from the ancestor, the heirs are not bound to produce the will of the ancestor, supposing that it can be shown that he made one; but the defendant, if he mean to bar the title of the heir at law, must show affirmatively a devise of the premises in question. *Brandt ex dem. Cuyler & Al. vs. Livermore*, 10 Johns. Rep. 358.

Evidence of the acts of the lessor of the plaintiff, which tend to conclude him, and those who derive title under him, is admissible. *Jackson ex dem. Goodrich & Al. vs. Ogden*, 4 Johns. Rep. 140.

Showing a line of boundary, and erecting a fence thereon, the party at the same time asserting his right to have more land, will not conclude him from afterwards contesting that boundary. *Jackson ex dem. Zimmerman vs. Zimmerman & Al.*, 2 Caines' Rep. 146.

A possession of 40 years, in conformity to a division line, will not be disturbed, on the ground that the line was run erroneously. *Jackson ex dem. Nellis vs. Dysling*, 2 Caines' Rep. 198.

[2] Hearsay evidence is sufficient to prove a pedigree. *Jackson ex dem. Ross vs. Cooley*, 8 Johns. Rep. 128.

The acknowledgment of a deed from persons describing themselves as heirs, taken according to the directions of the act, before the mayor of London, is also a circumstance of weight in evidence of pedigree. *Ibid.*

In an action of Ejectment, the lessors of the plaintiff resided in England, and claimed to be heirs of the person who died seised of the land in question; a witness here deposed, that he knew the ancestor, and had charge of the land, as his agent, and corresponded with him, and, after his death, with the lessor, who sent him a power to act for him, as heir and devisee,

er circumstances which will invalidate his title. In like manner, when the lessor claims as devisee, the defendant may show that the will was obtained by fraud; that it was not duly executed; that the testator was a lunatic; [3] that the lands (if copyhold) had not been properly surrendered; and so forth. [4] And as the same principle holds, whatever be the title of the claimant, any particular directions respecting the defendant's proofs are altogether unnecessary. It is sufficient to observe generally, that the defendant's evidence entirely depends on the nature of the proofs advanced by the plaintiff's lessor, and needs in no case to be extended beyond the rebuttal of them. [5]

and that his information was also derived from persons acquainted with the family of the lessors; *Held*, that this was sufficient evidence, *prima facie*, of pedigree or heirship, to go to the jury. *Ibid*.

Though hearsay and general reputation may be received as evidence of pedigree, yet where the witnesses are not connected with the family, have no personal knowledge of the facts of which they speak, and have not derived their information from persons connected, or particularly acquainted with the family, but speak generally of what they have heard and understood, such evidence is not sufficient for that purpose. *Jackson ex dem. Garland vs. Browner*, 18 *Johns. Rep.* 37.

Hearsay is admissible evidence of the death of a person. *Jackson ex dem. Miner vs. Boneham*, 15 *Johns. Rep.* 226.

[3] *Vide ANTE*, Page 259, n. [3].

[4] But an equitable lien or mortgage cannot be set up at law as a legal estate, to defeat a recovery in an action of Ejectment. *Jackson ex dem. Lowell vs. Parkhurst*, 4 *Wend. Rep.* 369. & *Vide ANTE* Page 32, n. [1].

The lessor of the plaintiff in Ejectment died pending the action, and his heirs at law were made parties in his place, without objection, and the cause continued several terms, and the plots amended. *Held*, that it was not competent for the defendant to defeat the action, by giving evidence that one of the heirs was an infant when she was made a party; and, that evidence that she was an infant at the time of the trial, would not entitle the defendant to a verdict against the other heirs who were of full age.—*James & Al. Lessee vs. Boyd*, 1 *Harris & Gill's Rep.* 1.

[5] Possession is presumptive evidence of right, and a defendant in Ejectment cannot be deprived of his possession by any person but the rightful owner of the land, he who hath the *jus possessionis*. *Hall vs. Gittings, Jr. Lessee*, 2 *Harr. & Johns. Rep.* 122.

Where defendant demurs to the evidence of the plaintiff it is not necessary it should be stated in the demurrer that the lessor of the plaintiff was in possession at any time within 20 years, to entitle him to judgment. *Lessee of Bayard vs. Colfax & Al.*, *Circ. Ct. U. S. N. J. April*, 1821. *MS.* (Cited in *Coxe's Digest*, 272.)

A conveyance to the defendant may be read in evidence though executed since issue joined. *Carter's Lessee vs. Parrot*, 1 *Tenn. Rep.* 237.

## CHAPTER XI.

### OF THE TRIAL AND SUBSEQUENT PROCEEDINGS.[1]

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THE claims of the several parties being prepared for the decis-

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[1] The "*Revised Statutes*" of *New-York*, Part 3, Chap. 5, Tit. 1, §§ 28, 29 & 30, (*Vol. 2, pp. 307, 308.*) enact as follows:

"§ 28. If the action be brought against several defendants, and a joint possession of all be proved, the plaintiff shall be entitled to a verdict against all, whether they shall have pleaded separately or jointly.

"§ 29. When the action is against several defendants, if it appear on the trial, that any of them occupy distinct parcels in severalty, or jointly, and that other defendants possess other parcels in severalty, or jointly, the plaintiff shall elect at the trial against which he will proceed, which election shall be made before the testimony in the cause shall be deemed closed; and a verdict shall thereupon be rendered for the defendants not so proceeded against.

"§ 30. In the following cases, the verdict shall be rendered as follows:

"1. If it be shown on the trial, that all the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs generally:

"2. If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant:

"3. If the verdict be for any plaintiff, and there be several defendants, the verdict shall be rendered against such of them as were in possession of the premises, or as claimed title thereto, at the commencement of the action:

"4. If the verdict be for all the premises claimed, as specified in the declaration, it shall in that respect be for such premises generally:

"5. If the verdict be for a part of the premises described in such declaration, the verdict shall particularly specify such part, as the same shall have been proved with the same certainty herein before required in the declaration, in the description of the premises claimed:

"6. If the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest; and if for an undivided share in a part of the premises claimed, it shall specify such share, and shall describe such part of the premises as herein before required:



ion of a jury,[2] by means of the fictions, conditions and [ \*288 ] \*proofs, described in the preceding chapters, the trial with its incidents,[1] and the subsequent proceedings, will now occupy our attention.

"7. The verdict shall also specify the estate which shall have been established on the trial, by the plaintiff in whose favour it shall be rendered, whether such estate be in fee, for his own life, or for the life of another, stating such lives, or whether it be a term for years, and specifying the duration of such term."

In Ejectment there is but one plaintiff; and therefore where several Lessors of the plaintiff, who were separately interested, joined in the same Ejectment; *Held*, that they could not be separately heard. *Doe on the several Demises of R. W. Fox, W. Burt, and W. Prideaux vs. W. Bromley*, 6 *Dowling & Ryland's Rep.* 292.

[2] The death of *one of the lessors* of the plaintiff in an action of ejectment, may be suggested after the jury are sworn, and his heir, &c. need not appear, or be made a party. *Howard vs. Moule & Al. Lessee*, 2 *Harr. & Johns. Rep.* 249.

A juror not interested in the ejectment to be tried, nor in any land, the title to which depends on the principles to be settled in it, is not liable to challenge for cause, on the ground that he is interested in another tract, held by the plaintiff under the same title, as that now in suit. *Gratz & Al. vs. Benner*, 13 *Serg. & R. Rep.* 110.

[1] If in an ejectment a landlord and tenant defend by different attorneys and have different counsel, but it appear that the tenant claims no title but what he derives from the landlord, the judge at the trial will only allow one counsel to address the jury for the defence, but the party's counsel who does not address the jury will be at liberty to cross-examine, and also to call witnesses. *Doe ex dem. Hogg vs. Tindale & Al.* 3 *Carr. & P's. Rep.* 565.

Where one is in possession of lands at the time of an ejectment served, and appears and pleads, generally, he cannot, at the trial, narrow his defence to part of the lands in his possession, but the plaintiff is entitled to a verdict for such part as he is entitled to, and could prove to be in the occupation of the defendant at the commencement of the suit. *Mayor, &c. vs. Clifford & Al.*, 4 *Yeates' Rep.* 272.

Where a *description* has not been filed in ejectment the Court can neither order on a cause for trial, nor grant a *non pros*, although a rule for trial or *non pros* has been obtained. *Russell vs. Fee*, 1 *Browne's Rep.* 194.

Nor will the Court strike an ejectment off the docket for want of a description, without a previous rule. *Russell vs. Fee*, 1 *Browne's Rep.* 196.

Where a cause had been depending for upwards of three years without a description, the Court, granted a rule to file a description, or *non pros*, returnable in four days. *Ibid.*

It is the duty of the plaintiff in ejectment, where, after a plea of not guilty, a rule for trial on *non pros* has been taken, to file a description of

The death of the lessor of the plaintiff, although he be only tenant for life, will not abate the action,[2, nor can it be pleaded *puis darrien continuance*; because the right is supposed to be in his lessee, (the plaintiff) who may proceed for the damages occasioned by the supposed ouster, although he cannot obtain possession of the land;(j) but a trial of \*this nature is unknown in practice, for the damages [ \*289 ]

(j) *Thrustout, d. Turner, v. Grey, Stran. 1056.*

the land, join issue, and put the cause on the trial list. *Galloway vs. Saunders, 2 Serg. & R. Rep. 405.*

If the *præcipe* for a summons in ejectment contain a sufficient description of the land, it is not necessary for the plaintiff to file another description according to the 6th Section of the Act of 21 March 1806. [*Pennsylvania.*] *Cahill vs. Benn & Al., 6 Binn. Rep. 99.*

[2] The "*Revised Statutes*" of *New-York*, Part 3, Chap. 5, Tit. 1, §§ 31, 32, (*Vol. 2. p. 308.*) contain the following enactments :

" § 31. If the right or title of a plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed; and that as to the premises claimed, the defendant go thereof without day.

" § 32. The action of ejectment shall not be abated by the death of any plaintiff, or of one of several defendants, after issue and before verdict or judgment; but the same proceedings may be had as in other actions, to substitute the names of those who may succeed to the title of the plaintiff so dying, in which case, the issue shall be tried as between the original parties; and in case of the death of a defendant, the cause shall proceed against the other defendants."

" The death of the lessor of the plaintiff does not abate the suit." *Austin v. ds. Jackson ex dem. Kimber & Al., 1 Wend. Rep. 27. SAME POINT, Frier & Al. vs. Jackson ex dem. Van Alen, (IN ERROR,) 8 Johns. Rep. 495. Doe ex dem. Marston & Al. vs. Butler, 3 Wend. Rep. 153. Robertson vs. Morgan, 2 Bibb's Rep. 148.*

And where the lessor of the plaintiff was entitled to a life estate, in the premises, but the defendant had the reversionary interest therein; and pending the suit, the life estate terminated by the death of the lessor; the Court said, "The plaintiff, then, has no title to turn the defendant out of the possession; but he has a title to the mesne profits, and the costs of this suit, and must therefore have judgment to enable him to recover them." "There must be a judgment for the plaintiff with a perpetual stay of the writ of possession." *Jackson ex dem. Henderson vs. Davenport, 18 Johns. Rep. 295, 302.*

But, on a motion for judgment as in case of nonsuit, for not proceeding to trial pursuant to stipulation, the death of the lessor, after the stipulation, and previous to the circuit at which the cause ought to have been tried,

in ejectment are only nominal,[1] and if the plaintiff be nonsuited from the refusal of the defendant to appear at the trial, the executor of the lessor will not be entitled to his costs, for the consent rule is merely personal.(k)

(k) *Thrustout v. Bedwell*, 2 Wils. 7.

was offered in excuse; the Court said, "The excuse offered will be received so far, as to permit a new stipulation on payment of costs; otherwise the motion must be granted." *Austin ad. Jackson ex dem. Kimber & Al* 1 Wend. Rep. 27.

Ejectment abates by the death of the lessor of the plaintiff. *Howard vs. Gardiner*, 3 Har. & M'Hen. Rep. 98.

"The defendant may move to have the demise of a lessor, who died before the commencement of the action, struck out of the declaration."—(Per SUTHERLAND, J. *delivering the Opinion of the Court.*) *Doe ex dem. Marston & Al. vs. Bulter*, 3 Wend. Rep. 153. SAME POINT. *Jackson ex dem. Low & Al. vs. Reynolds*, 1 Caines' Rep. 20. *Jackson ex dem. Bulter & Al. vs. Ditz*, 1 Johns. Cas. 392. *Jackson ex dem. Aikins & Al. vs. Bankcraft*, 3 Johns. Rep. 259.

And this motion may be made after the defendant has entered into the consent rule. *Jackson ex dem. Low & Al. vs. Reynolds*, 1 Caines' Rep. 20.

It seems, that a plaintiff in Ejectment cannot recover on a demise from a person who is dead at the time of the action brought. See *vs. Greenlee*, 6 Munf. Rep. 303.

An Ejectment does not abate by the death of the lessor of the plaintiff. *Kinney vs. Beverly*, 1 Hen. & Munf. Rep. 531.

An appeal from a judgment in Ejectment does not abate by the death of the lessor of the plaintiff, notwithstanding such lessor claimed the land for life only. *Medley vs. Medley*, 3 Munf. Rep. 191.

[1] The damages in ejectment at common law are merely nominal, and a verdict finding for the plaintiff, without assessing damages, is not thereby vitiated. *Harvey vs. Snow* 1 Yeates' Rep. 159. *Emigh's Lessee vs. Rinehart*, CITED 1 Yeates' Rep. 157.

If the plaintiff choose to proceed for *mesne* profits in the action of ejectment at common law, he may do so, on giving notice to the defendant of his intention. *Lessee of Battin vs. Bigelow*, 1 Peter's Circ. Ct. Rep. 462.

A writ of inquiry of damages will lie in ejectment. *Joan & Al. vs. Shield's Lessee*, 3 Har. & M'Hen. Rep. 7.

But the *mesne profits* cannot be given in evidence on the execution of a writ of inquiry in ejectment. *Gore's Lessee vs. Worthington*, 3 Har. & M'Hen. Rep. 96.

On the hearing in the assessment of damages upon default in ejectment brought to recover possession of lands holden by the levy of an execution, the *mesne profits* are to be computed from the date of the levy of the execution, and not from the six months allowed by the statute for the defendant to redeem. *Little vs. Meacham*, 1 Tyler's Rep. 438.

When the defendant refuses at the trial to confess lease, entry, and ouster, the plaintiff must be called and nonsuited, and the cause of the nonsuit specially indorsed upon the *postea*; and the lessor of the plaintiff will then be entitled to have judgment entered against the casual ejector.<sup>(1)</sup>[2] With respect, however, to the time of entering this judgment, a considerable difference prevails between the practice of the Court of King's Bench, and of the Common Pleas: the judgment being signed, and the execution taken out, in the latter court, immediately after the entering of the nonsuit, and, in the former, not until the day in bank when the *postea* is returned.<sup>(m)</sup>[3]

It is to be regretted that two of the superior courts of the kingdom should differ upon a point so essential to the regular administration of justice; but it is not easy to decide which is the more eligible mode of proceeding. By the practice of the Court of Common Pleas, a more early possession is given to the plaintiff, (in some cases of nearly four months;) and this seems a just punishment upon the defendant, for refusing

(1) *Turner v. Barnaby*, Salk. 259. Appen. *Throgmorton, d. Fairfax, v. Bentley*, 2 T. R. No 83. 779.

(m) *Doe, d. Palmerston, v. Copeland, et*

An agreement between the parties to an ejectment that the defendant should remain in possession of the premises on a certain condition, is no bar to a recovery of the *mesne* profits if the condition were not performed. *Longstreet vs. Ketcham* 1 Coze's Rep. 170.

In Ejectment it was ruled that the *mesne* profits might be recovered, and that in assessing them the jury might include all the plaintiff's reasonable and necessary expenses; such as a fee to counsel. *Denn ex dem. Delatouche vs. Chubb*, 1 Coze's Rep. 466.

[2] Vide "*Revised Statutes*" of New-York, Part 3, Chap. 5, Tit. 1, §§ 26, 27. (*Vol. 2. pp. 303, 307.*) Cited ANTE, Page 236, n. [2].

Where in Ejectment, the tenants in possession, having undertaken to appear, enter into the consent rule, plead *instante*, and take short notice of trial, made no defence at the trial, but sued out a writ of error when judgment was signed, the court allowed the lessor of the plaintiff to take his judgment against the casual ejector. *Doe ex dem. Morgan vs. Roe*, 3 Bingh. Rep. 169.

[3] Where a plaintiff in Ejectment has been nonsuited, the defendant not having appeared to confess lease, entry, and ouster, judgment may be regularly signed on the first day of the ensuing term and writ of possession issued on the same day, although the *postea* be not delivered over at the time by the associate, to the attorney for the plaintiff. *Doe ex dem. Davies & Uz. vs. Roe*, 1 Barnew. & Cress. Rep. 118.

to perform his previous promise; whilst on the other hand, it is said by the Court of King's Bench, that the defendant may possibly have some good reason for not confessing, as, for example, want of due [ \*290 ] notice of trial, and that it is but fair he should have an opportunity of assigning such reason to the Court.

If the defendant refuse to appear, the proceedings are the same whether he be tenant or landlord; and the motion for judgment against the casual ejector, on a nonsuit for want of appearance, is absolute in the first instance. (n)

If there be several defendants, and some of them refuse to appear and confess, it is the practice to proceed against those who do appear, and enter a verdict for those who do not, endorsing upon the *postea*, that such verdict is entered for them, because they do not appear and confess; and the plaintiff's lessor will then be entitled to his costs against such defendants, and to judgment against the casual ejector for the lands in their possession. (o) [1]

If there be any material variance between the issue and the record, [2]

(n) *Stiles, d. Redhead, v. Oates*, Barn. 182. *Fenn. d. Rickatson, v. Marriott*, Barn. 185.

(o) *Clasmore v. Searle*, Ld. Raym. 729. B. N. P. 28. Formerly, if some of the defendants did not appear, the plaintiff was non-

suited as to all; because all the defendants not admitting the demise, he could not maintain his declaration. The present practice was adopted in the reign of William III. (*Haddock's case*, 1 Vent. 355.) *Fagg v. Roberts*, 2 Vent. 193.

[1] Where two or more persons holding by separate and distinct possessions different parts of the same tract, are united in the same action, jointly enter into the same common rule, and plead jointly, judgment may be given against them separately if their separate possessions are found by a jury; and if their separate possessions are stated in a demurrer to evidence, the law is the same. *Lessee of Bayard vs. Colfax & Al.* Circ. Ct. U. S. N. J. April, 1821. MS. (CITED in *Coze's Digest*.)

[2] Amendment by inserting the defendant's name in the *Nisi Prius* record, in the place where it is usually inserted before the allegation of entry and ouster, the omission being by mistake. *Jackson ex dem. Young vs. Young*, 1 Cowen & Rep. 131.

This was done after a nonsuit at the circuit, for the defendant's not appearing, &c. *Ibid*.

And though the defendant swear to merits in such a case, the Court will not relieve, unless he excuse his default. Such an omission is no irregularity. It is matter for motion in arrest, or error, and the record is not void, but voidable, and may be amended. *Ibid*.

it seems that the defendant should nevertheless appear at the trial, and afterwards move the Court to set aside the verdict for the variance; because if he do not appear, he is out of court, and cannot afterwards properly move to set aside the nonsuit; yet, upon a motion of this nature, the Court did, in one case, grant the rule upon payment of costs,<sup>(p)</sup> and in another case staid the proceedings.<sup>(q)</sup>

\*In a case where the demise was laid on a day not come at [ \*291 ] the time of the trial, the defendant was notwithstanding obliged to confess, as the plaintiff would otherwise have been nonsuited, and have been entitled to judgment against the casual ejector.<sup>(r)</sup>

If the property litigated be of great value, and difficulties are likely to arise in the course of the trial, the Court will grant a trial at bar; and the motion for this purpose may be made by either party.<sup>[1]</sup> But the mere value of the premises,<sup>(s)</sup> or the probability of a protracted trial, will not be sufficient to induce the Court to grant the application; difficulty must concur; and, therefore, the motion must be supported by an affidavit, stating "the value *per annum* of the estate; that many witnesses are to be produced on each side; that the title of the lessor of the plaintiff will depend, as the case may be, on an intricate course of descent, or the legal operation of deeds; that various points of law, and other questions, will necessarily arise at the trial; and that the cause, therefore, should be tried at the bar of the Court, by a special jury of the county where the estate lies, if the Court shall so think fit, and not before any one judge of assize."

\*It has been said, that the rule is not to allow a trial at bar [ \*292 ] in ejectment, unless the value of the lands be a hundred pounds *per annum* ;<sup>(t)</sup> and in some authorities it is laid down, that it is

(p) *Jones, d. Thomas, v. Hengest*, Barn. 175. *ker, v. Cole*, Barr. 1159.

(q) *Law, v. Wallis*, 1 Barn. 156.

(s) *Lord Sandwich's case*, Salk. 648.

(r) *Anon. Ld. Raym. 723. et Small, d. Ba-*

(t) *Goodright v. Wood*, 1 Barn. 141.

[1] The "*Revised Statutes*" of New-York, Part 3, Chap. 7, Tit. 4, § 1, (*Vol 2, p. 409.*) specify the cases in which a trial at bar may be had.

"§ 1. All issues of fact which shall be joined in the court of chancery, or in any surrogate's court, and which shall be sent to the supreme court for trial; and all issues of fact joined in the supreme court; shall be tried at a circuit court, or sittings of the supreme court, in the proper county; unless the supreme court shall, on the motion of either party, in cases of great difficulty, or which require great examination, order such trial to be had at the bar of the said court."

not sufficient to swear generally, that the cause is expected to be difficult, but that the particular difficulty, which is expected to arise, ought to be pointed out, to enable the Court to judge whether it be sufficient.(u) And, in a recent case, the Court refused a trial at bar, on the mere allegation of length, and probable questions of difficulty in a cause respecting a pedigree.(v)

In other actions, a rule for a trial at bar is never granted before issue joined; but as the issue in ejectment is very seldom joined until after the end of term, when it would be too late to make the application, the motion in this action may be granted even before appearance.(w)

As the granting of a trial at bar is a *favour* conferred upon the applicant, the courts exercise the power of annexing equitable conditions to their grant. Thus, where, on application made by the defendant for a trial at bar, it appeared, on showing cause against the rule, that the lessor of the plaintiff was unable to bear the expense, and that one of the witnesses was about eighty years of age, who might die before a trial at bar could be had. The Court granted the application, but said, that it was a favour asked by the defendant, they would lay him under terms, that if he succeeded, he should only have *nisi prius* costs, but if the lessor of the plaintiff were to succeed he should have bar [ \*293 ] costs, and that the old witness should be examined \*on interrogatories, and her deposition read, if she should die before the trial. It was also, by consent, made part of the rule, that the cause should be tried by a Middlesex jury, instead of one from Norfolk, where the premises were situated.(x) And, in another case, where the lessor of the plaintiff had had a rule for a trial at bar, but having laid the demise by a wrong person, had discontinued the action, and brought a new ejectment; the Court would not grant him a second rule for a trial at bar until he had paid the costs of the former ejectment.(y)

After verdict, the successful party is, of course, entitled to the judgment of the Court;[1] but the same time is allowed to the other party

(u) *Rees v. Burgesses of Caermarthen*, Bay, 455.  
79. 2 Lil. P. R. 740. *Goodright v. Wood*, 1  
Barn. 141.

(v) *Tidd*, 768.

(w) *Roe, d. Cholmondeley, v. Doe*, Barn.

(x) *Holmes d. Brown, v. Brown*, Doug.  
437.

(y) *Lord Coningsby's case*, Stran. 548.

[1] If in Ejectment the jury "find for the plaintiff one cent damages,"

to move for a new trial, or an arrest of judgment, in ejectment, as in other actions.

The courts will seldom grant a new trial in ejectment, when the verdict is given for the defendant,[2] because all parties remaining in the situation they were, previously to the commencement of the action, the claimant may bring a second ejectment without subjecting himself to additional difficulties; but this principle does not apply when the verdict is given against the defendant. The possession is then changed. The defendant in the first ejectment becomes the plaintiff's lessor in the second, and is obliged to give evidence of his own title, instead of merely rebutting the claim set up by his opponent; and as this is a point \*of material consequence to him, "the courts (to use [ \*294 ]

the clerk in the order may extend the verdict, as if it were, "We of the jury find for the plaintiff the lands in the declaration mentioned, and one cent damages." *M'Murry vs. O'Neal*, 1 *Call's Rep.* 246.

In *Pennsylvania*, a conditional verdict in Ejectment, is good. *Coolbaugh & Al. vs. Pierce*, 8 *Serg. & R. Rep.* 418.

After the plaintiff in Ejectment has proved his title to a verdict, the court will not try the question of the precise extent of the plaintiff's claim as defended by particular metes and bounds. *Doe ex dem. The Drapers' Company vs. Wilson*, 2 *Starkie's Rep.* 477.

Plaintiff may take a verdict for certain described premises, and as to other described premises, enter a verdict for the defendant. (*Per SPENCER, Senator.*) *Seward vs. Jackson ex dem. Van Wyck*, 8 *Cowen's Rep.* 406.

On the trial of an Ejectment, the Court cannot take notice of equitable circumstances, which do not constitute a complete title. *Den ex dem. Cunningham vs. Michael, Cam. & Norw. Rep.* 77.

In Ejectment, an objection cannot be made at the bar that the plaintiff failed at the trial to make out a title, unless such objection was previously made at the trial. *Jackson ex dem. Scofield vs. Collins*, 2 *Cowen's Rep.* 89.

[2] Where a verdict in favour of a defendant in Ejectment, is founded in mistake and produces injustice, it is both the *right and duty* of the court to grant a new trial. *Deems vs. Quarrier, &c.* 3 *Rand. Rep.* 475.

The Court inclined to think, that paupers, supported by the township, might unite with the overseers of the poor in an Ejectment; but at any rate, refused to grant a new trial on that ground. *Ripple & Al. vs. Ripple & Al.* 1 *Rawle's Rep.* 366.

If the verdict of a jury is insufficient or contrary to the admission of the parties, the court have the power of granting a new trial or ordering a *re-nire*. *Hughes' Lessee vs. Howard*, 3 *Harr. & Johns. Rep.* 9.



Lord *Mansfield's* words) rather lean to new trials on behalf of the defendants in case of ejectments, especially on the footing of surprise.”(z)

### OF THE JUDGMENT.[1]

(z) *Climer v. Littler*, 1 W. Blk. 345. 348.

[1] The “*Revised Statutes*” of New-York, Part 3, Chap. 5, Tit. 1 §§ 33, 35, 36, 37, 38, 39, 40, 41, 42 & 43, (*Vol. 2, pp. 308 & 309,*) contain the following provisions:

“§ 33. In cases where no other provision is made, the judgment in the action, if the plaintiff prevail, shall be, that the plaintiff recover the possession of the premises, according to the verdict of the jury, if there was such verdict; or if the judgment be by default, according to the description thereof in the declaration, with costs to be taxed.”

“§ 35. Upon a judgment against the plaintiff, or one or more plaintiffs, in cases where they shall be liable for costs, execution for the collection of the same, shall be issued as upon judgments in personal actions; and the proceeding by attachment for the collection of such costs, is hereby abolished.

“§ 36. Every judgment in the action of ejectment, rendered upon a verdict, shall be conclusive as to the title established in such action, upon the party against whom the same is rendered, and against all persons claiming from, through or under such party, by title accruing after the commencement of such action, subject to the exceptions herein after contained.

“§ 37. The court in which such judgment shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs or assigns, and upon payment of all costs and damages recovered thereby, shall vacate such judgment and grant a new trial in such cause. And the court upon subsequent application made within two years after the rendering of the second judgment in said cause, if satisfied that justice will be thereby promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment and grant another new trial. But no more than two new trials shall be granted under this section.

“§ 38. Every judgment in ejectment rendered by default, shall, from and after three years from the time of docketing the same, be conclusive upon the defendant, and upon all persons claiming from or through him by title accruing after the commencement of the action. But within five years after the docketing of such judgment, on the application of the defendant, his heirs or assigns, and upon payment of all costs and damages recovered thereby, the court may vacate such judgment and grant a new trial, if such court shall be satisfied that justice will be promoted, and the rights of the parties more satisfactorily ascertained and established.

“§ 39. But if the defendant in such action, at the time of the docketing of the judgment by default, be either,

“1. Within the age of twenty-one years: or,

“2. Insane: or,

“3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence, for any term less than for life: or,

By the judgment in ejectment, the plaintiff's lessor obtains possession of the lands recovered by the verdict, but does not acquire any title thereto, except such as he previously had.[2] If, therefore, he have a freehold interest in them, he is in as a freeholder; if he have a chattel interest, he is in as a termor; and if he have no title at all, he is in as a

"4. A married woman:

"The time during which such disability shall continue, shall not be deemed any portion of the said three years; but any such person may bring an action for the recovery of such premises after that time, and within three years after such disability shall be removed, but not after that period.

"§ 40. If the person entitled to commence such action, shall die during the continuance of any disability specified in the preceding section, and no determination or judgment be had of or upon the title, right or action so to him accrued, his heirs may commence such action, after the time above limited for that purpose, and within three years after his death.

"§ 41. If the plaintiff shall have taken possession of the premises, by virtue of any recovery in ejectment, such possession shall not in any way be affected by the vacating of any judgment, as herein provided; and if the defendant recover in any new trial hereby authorised, he shall be entitled to a writ of possession, in the same manner as if he was plaintiff.

"§ 42. Upon any new trial granted as herein provided, the defendant may show any matters in bar of a recovery, which he might show to entitle him to the possession of the premises, if he were plaintiff in the action.

"§ 43. The plaintiff recovering judgment in ejectment in any of the cases in which such action may be maintained, shall also be entitled to recover damages against the defendant for the rents and profits of the premises recovered. But if such action be brought for the recovery of dower, the plaintiff shall be entitled to recover such damages, only in the cases and to the extent prescribed in the first Chapter of the Second Part of the Revised Statutes."

[2] "In ejectment at least, if not in every possible case, the decision of this Court [*Supreme Court, U. S.*] must conform to the state of rights of the parties at the time of its own judgment so that a treaty, although ratified subsequent to the decision of the Court appealed from; becomes a part of the law of the case, and must control our decision." *Fairfax's Devisee vs. Hunter's Lessee*, 7 *Cranch's Rep.* 603. 632. (*Per Johnson, J.*)

The whole effect of a judgment for the plaintiff in ejectment, is to put the lessor of the plaintiff into possession of the land; and the only point decided is, that he has a better title to the possession than the defendant. *Chapman vs. Armistead*, 4 *Munf. Rep.* 382.

Motion in arrest of judgment because the declaration against the casual ejector was wrongly entitled, and for other defects in it, refused, because the declaration *de novo* to which the defendant had pleaded was right. *Lessee of Huydekoper vs. Burrowes*, 1 *Wash. Circ. Ct. Rep.* 109. (cited in *Coac's Digest*, p 271.)

trespasser,[3] and liable to account for the profits to the legal owner, without any re-entry on his part ;(a) the verdict in the ejectment being no evidence in a subsequent action, even between the same parties.(b) [4] Since, however, the claimant has a mere *possession* given to him by the judgment, it may be asked how he can become *seised* according to his title, if he have more than a chattel interest in the land. This is effected by another fiction. It is a rule of law, that when a man, having a title to an estate, comes into possession of it by lawful means, he shall be in possession according to his title ; and, therefore, when *possession* is given by the sheriff, the possession and title are said to unite, and the plaintiff's lessor holds the lands according to the nature of his interest in them.

As the judgment is grounded on the verdict, it ought not to be entered up for more land, or for different parcels, than the defendant [ \*295 ] was found guilty of by the verdict,[5] though a \*variance be-

(a) *Taylor, d. Atkins, v. Horde*, Burr. 60. (b) *Clerke v. Rowell*, 1 Mod. 10. 90. 114.

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[3] "The amount of a recovery, in ejectment is accurately and forcibly "stated, by Lord Mansfield, in the case of *Atkins vs. Horde*, (1 Burr. 114.) "It is a recovery of the possession (not of the seisin or freehold) without "prejudice to the right as it may afterwards appear, even between the "same parties. He who enters under it, in truth and substance, can only "be possessed according to right. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a termor. If he has no "title he is in as a trespasser. *If he had no right to the possession, then "he takes only a naked possession.* This is the obvious and established "construction of the nature and effect of a judgment in the action of ejectment." (Per VAN NESS, J. *delivering the Opinion of the Court.*) *Jackson ex dem. Wright & Al. vs. Dieffendorf & Al.* 3 Johns. Rep. 270.

[4] A former judgment for the defendant in an action of ejectment or disseisin, on the issue of *no wrong and disseisin*, is not an estoppel of the plaintiff's title ; as such judgment may have been rendered, on the ground that the defendant had not been in possession, or had possessed by license from the plaintiff, or on some other ground not involving the question of title. *Smith vs. Sherwood*, 4 Connect. Rep. 276.

A judgment in ejectment rendered on confession, is not evidence against the plaintiff in another ejectment more than a judgment on a verdict would be. *Betts, &c. vs. Shields' Heirs*, 3 Litt. Rep. 36.

[5] A verdict in Ejectment, "that the defendant should have the third part of the 41 acres and 32 perches neat, and if any overplus, it goes to the plaintiff," is too uncertain ; and it cannot be cured by the Court's appointing a surveyor to designate the rights of the parties and rendering judgment thereon. *Smith vs. Jenks & Al.* 10 Serg. & L. Rep. 153.

tween the verdict and judgment, occasioned by the misprision,

In Ejectment, the verdict being for the plaintiff, for the lands laid down in a survey made in the cause, as comprehended within certain lines described by the jury; a judgment that the plaintiff recover his term yet to come, of and in the lands in the declaration mentioned, is erroneous. *Lee vs. Tapscott*, 2 Wash. Rep. 276.

A judgment in Ejectment must be for the premises in the declaration mentioned. It is error to take a judgment for the land in the plot described. *Woolry vs. Clay*, 3 Marsh. Rep. (Ky.) 136.

In Ejectment against several defendants, who possessed the premises in separate parts, and who entered into the consent rule, and pleaded jointly, the jury found each defendant separately guilty, as to that part of the premises in his separate possession, and not guilty as to the other parts possessed by the defendants; the verdict is good, and the plaintiff is entitled to judgment against all the defendants, severally, according to the finding of the jury. *Jackson ex dem. Haines & Al. vs. Woods & Al.*, 5 Johns. Rep. 278.

Where several defendants appear and plead jointly, and enter into the consent rule jointly, the plaintiff is bound to prove a joint possession of all the defendants; and if on the trial, it appear, that two of the defendants occupied distinct parcels of the premises in severalty, and that the other defendants possessed the residue of the premises jointly, the plaintiff can have judgment only against the defendants holding jointly, and the defendants holding in severalty, will be entitled to judgment. *Jackson ex dem. Murray & Al. vs. Hazen & Al.* 2 Johns. Rep. 438.

The plaintiff in Ejectment may recover less land than the quantity stated in his declaration. But, if the jury find a special verdict, shewing the plaintiff entitled to a certain number of acres, part of the tract sued for, and do not specify the boundaries of such part with so much precision, as that possession thereof may with certainty be delivered, a *venire de novo* ought to be awarded. *Clay vs. White & Al.* 1 Munf. Rep. 162.

Issue being joined in Ejectment on the title only, a verdict may be found and judgment rendered for a tract of land, "according to a survey filed in the cause;" though described in the declaration as a "message with the appurtenances;" in a subsequent part thereof, as "the said tenement with its appurtenances;" and in the conclusion, as "the plaintiff's said farm;" without mentioning quantity or boundaries. *Paul vs. Smiley*, 4 Munf. Rep. 468.

A verdict in Ejectment set aside as being uncertain and contradictory, and not to be reconciled without a strained construction. *Doc, Lessee of Murra vs. Northem*, 1 Wash. Rep. 282.

A verdict in Ejectment, finding for the plaintiff in general terms, a certain "number of acres, part of the premises in the declaration mentioned," without designating the boundaries of such part, or referring to some certain standard, to supply such defect, is too uncertain to warrant a judgment upon it. *Gregory vs. Jackson*, 6 Munf. Rep. 25.

A special verdict in Ejectment, set aside, for not finding the time of the death of a person, under whom the lessors of the plaintiff might or might not have been entitled to the land in controversy; their title depending

or default, of the clerk in entering the judgment, is not fatal, but may be amended by the Court, even after a writ of error brought.(c)

(c) *Mason v. Foz*, Cro. Jac. 631. Appendix, No. 34.

upon the time when he died, which from the circumstances disclosed in the verdict, *probably could have been found* by the jury; also, for not finding whether the defendant, or those under whom he claimed, had, or had not such possession of the land as would be sufficient for his defence, in that action, whatever might be the state of the title. *Cropper vs. Carlton & Ux.* 6 *Munf. Rep.* 277.

In Ejectment on separate demises for *undivided* parts of the land, before the trial, all the lessors, except one, had parted with their legal interest in the land, and the nature of his interest had been converted from an undivided portion in the whole, to a *several* and entire interest in part. *Held*, that although the plaintiff can recover less than he claims, yet it *must* consist of the *same nature* with that claimed. If he claim one hundred acres, less than one hundred may be recovered. If he claim an undivided moiety, an undivided third may be recovered, or any undivided portion less than a moiety; but he cannot recover an *undivided* part when he claims an *entirety*, nor an *entirety* when he demands an *undivided portion*. *Carroll & Al., Lessee vs. Norwood's Heirs*, 5 *Harr. & Johns. Rep.* 164.

A judgment in ejectment, for the plaintiff on a single demise, contained in a single count, that he recover his term in two parcels of land, being erroneous as to one parcel is so *in toto*. (*Per* SPENCER, Senator.) *Seward vs. Jackson ex dem. Van Wyck*, [IN ERROR] 8 *Cowen's Rep.* 406.

For a Court of Error cannot divide a judgment, which is entire, reversing it in part and affirming it in part. *Ibid.*

Otherwise, perhaps, where the declaration in ejectment contains more than one count. *Ibid.*

Where ejectment was brought by one tenant in common against his co-tenant for an undivided moiety, and the consent rule for the undivided moiety was entered in the common form, and the plaintiff proved title to an undivided moiety only; *Held*, that the defendant was entitled to judgment as to the one moiety, though, as to the other, the plaintiff was entitled to judgment by default. *Jackson ex dem. Jones & Al. vs. Lyons*, 18 *Johns. Rep.* 398.

Where the title of the lessor, being a *life-estate*, ends before the trial, the plaintiff is entitled to judgment, but with a perpetual stay of the writ of possession, so as to enable him to bring an action for the *mesne* profits. *Jackson ex dem. Henderson vs. Davenport*, 18 *Johns. Rep.* 295.

In an action of ejectment for 50 acres of arable land, 10 acres of meadow, and 100 acres of woodland, part of a tract of land called *H. F.* The jury by their verdict found the true location of that tract, and also the location of other tracts of Land for which the defendant took defence. They also found for the plaintiff all the land called *H. F.*, as located by them, which lies clear of the other tracts so located by them, and which lies to the eastward of a division line between the plaintiff's lessor and *J. S.*, from a particular point to another. *Held*, that the verdict, and the judgment thereon rendered, were not uncertain, and were not for more land than the plaintiff claimed in his action. *Hall vs. Gitting's Lessee*, 2 *Har. & Johns. Rep.* 380. 393.

The Courts, indeed, after judgment, make every possible intendment in favour of the claimant;[1] and if the title declared on can by any means be supposed to exist, consistently with the judgment, such judgment will be supported. Thus, where two demises were laid, by different lessors, of the same premises for the same term, both as to commencement and duration, and the judgment was, that the plaintiff recover his *terms* in the premises; and it was objected, that both lessors could not have a title to demise the whole: and that, therefore, there was an inconsistency in the judgment, and that it did not appear which of the lessor's rights was established; the Court affirmed the judgment;[2] because, after a verdict, a bare possibility of title consistent with the judgment is sufficient, and the two lessors might have been

[1] In Ejectment the jury have a right to find a general verdict for the plaintiff, if the defendant produce a patent of elder date for a part of the land, without designating what part. *Buckley vs. Cunningham*, 4 *Bibb's Rep.* 285.

The omission of the name of the Township in the Writ of Ejectment will be fatal on a plea in abatement. *Lyons vs. Miller & Al.*, 4 *Serg. & R. Rep.* 280.

But if the objection be not pleaded in abatement it cannot be afterwards made. *Ibid.*

A variance in the description of land, between the writ and the statement filed in ejectment brought under the act of 21st March, 1806, [*Pennsylvania*.] is cured by verdict. *Thomas vs. Culp*, 4 *Serg. & R. Rep.* 271.

[2] Where two demises are laid in the declaration, one valid and the other void, and the judgment is, that the plaintiff recover his term, in the singular, it shall be adjudged to have been rendered on the valid demise. *Cox vs. Lacy*, 3 *Litt. Rep.* 334.

The defendant in ejectment, who had himself conveyed the land to the plaintiff is estopped to deny that he had title when he conveyed. *Ibid.*

If several demises are laid in the declaration, from several lessors, and the Court give judgment for the plaintiff to recover "his term yet to come," the judgment will be sustained, and the plaintiff can only have one execution. *Camden & Al. vs. Haskill*, 3 *Rand. Rep.* 462.

After issue joined in ejectment on the *title* only, and a verdict for the plaintiff, for the land in *one* of the *counts* in the declaration mentioned; it is no ground for arrest of judgment, that the *two counts* laid demises of the *same* land from different persons. *Throckmorton vs. Cooper's Lessee*, 3 *Munf. Rep.* 93. *Quere.* Would a demurrer to the declaration in this case have been sustained?

A plaintiff in ejectment, may recover under one or the other of two demises of the same land, from different persons. *Hopkins & Al. vs. Ward & Al.*, 6 *Munf. Rep.* 38.

joint tenants, and yet to refuse to join in a lease.(d) In like manner, where the declaration contained two distinct demises, by two different lessors, of two distinct undivided thirds, and judgment was given, that the plaintiff "*do recover his said terms*," and on error it appeared, (from the facts stated in a bill of exceptions to the judge's directions on a point of law,) that the ejectment respected only one undivided third, the judgment was held well enough, when the point was only raised on a bill of exceptions, and *semble* that it would have been well even on a special

verdict.(e) Upon the same principle, when in an ejectment [ \*296 ] on two several demises of two separate parcels of lands, the judgment was entered, that the plaintiff do recover his *term*, and an objection was taken, that it should have said, that the plaintiff do recover his *terms*; the Court said they would extend the word *term* to his *term* in *A*, and his *term* in *B*., and affirmed the judgment.(f) And where the ejectment was upon two demises, by different lessors, and the second demise was, "*of the aforesaid premises*," and judgment was entered for the plaintiff as to the first demise, and the defendant as to the other; and it was objected, that from not stating the second demise to be of "*other premises*," the judgments were contrary to each other, inasmuch as the defendant was put without day, as to the same premises for which the plaintiff recovered, the Court affirmed the judgment, and construed the *aforesaid premises which the second lessor demised* to mean the term in the premises.(g) So, also, where the plaintiff in ejectment declared upon two demises of several lands, by several parties, but laid only one *habendum*, namely, *habendum tenementa prædicta*, so demised by the aforesaid several parties, for seven years, and it was assigned for error, that the declaration was ill for want of another *habendum*; for that the verdict was general, and it was uncertain to which demise the single *habendum* related, the Court held, that *reddendo singula singulis*, it was well enough.(h) Where, also, the declaration was for lands, and common of pasture generally, without stating the common to be appendant, or appurtenant, it was intended after verdict, on a writ of error, to be such common as ejectment could be maintained for.(i)

And where the ejectment was for one messuage, or tenement, [ \*297 ] and four acres of land to \*the same belonging, the words, "to

(d) *Morres v. Barry*, Stran. 1180. *Ante*, 187.

(e) *Rauce, d. Boyce, v. Power*, 2 N. R. 1. 28.

(f) *Warrall v. Bent*, Stran. 835.

(g) *Fisher v. Hughes*, Stran. 908.

(h) *Slabourne v. Bengo*, 1 Ld. Raym. 561. *Moore v. Fursden*, 2 Vent. 214. S. C. Carth. 224. S. C. Comb. 190.

(i) *Newman v. Holdmyrst*, Stran. 54. *Ante*, 17.

the same belonging" were held to be void; for land cannot properly belong to a house, and then it is a declaration of a messuage or tenement, and four acres of land, which, though it be void for the tenement, is good for the *land*; for which the plaintiff, upon releasing the damages, had judgment. (j)

Upon a similar principle, where the plaintiff, in the *first* year of his present majesty's reign, declared upon a demise made in the *thirty-third* year of his present majesty, the Court held, that it was well enough after verdict; because it was only a title defectively set out, and there could be no doubt but that a proper title was proved at the trial. (k)

If the plaintiff obtain a verdict for the whole premises demanded, the entry of the judgment is, that the plaintiff recover his term against the defendant, of and in the premises aforesaid, or that he recover possession of the term aforesaid. [1] And this form is also used where a moiety, or other part of the whole premises is recovered; as, for example, when the plaintiff declares for forty acres in *A.*, and recovers only twenty; and it is at the lessor's peril that he take out execution for no more than he has proved title to. But where the verdict is for some parcels and not for \*all, or part of all, as where the plaintiff [ \*298 ] declares for lands in *A.*, and lands in *B.*, and the defendant is found guilty in *A.* only, the judgment (l) is, that the plaintiff recover his term in *A.*; and as to the other part, whereof the jury acquitted the defendant, that the plaintiff be in mercy, and that the defendant go thereof without day. (m)

If the defendant be acquitted of part, and judgment be entered, *quod*

(j) *Wood v. Payne*, Cro. Eliz. 186. In an old case, where the plaintiff declared on a lease of a house, ten acres of land, twenty acres of meadow, and twenty acres of pasture, by the name of "a house and ten acres of meadow, be the same more or less," and had a verdict, the judgment was arrested; because the declaration was so uncertain and repugnant, that even the verdict could not help it, the land mentioned in the declaration being so different from that mentioned in the

pernomen. (*Anon.* Yelv. 166.) But *quære*, if such a verdict would not now be good for the ten acres?

(k) *Small d. Baker, v. Cole*, Barr. 1150.

(l) As an ejectment is an action of trespass *vi et armis*, the judgment before the statute of 5 and 6 W. & M. c. 12. used to run *quod defendens, copiaturs*; but, since that statute, such entry is no longer necessary. (*Linsay v. Clerk*, Carth. 280. S. C. 5 Mod. 285.)

(m) Judgment Book, 72, 73.

[1] The usual judgment in Ejectment is for the premises in the declaration mentioned, and a judgment for all the lands that the tenant had not enclosed on a certain day, is good. *Simpson's Heirs vs. Shannon's Heirs*, 5 Litt. Rep. 322.



*defendens sit quietus quoad*, that part whereof he is acquitted, this is error ; for the judgment in this action is not final, as in a writ of right ; nor does it protect the defendant from any further suit, but only acquits him against the title set up by the plaintiff in the action.(n)

If a sole defendant die after the commencement of the assizes and before verdict, or after verdict and before judgment, it will not abate the suit ; [1] nor can his death be alleged for error, provided the judgment be entered within two terms after the verdict.(o)

When there are several defendants, and one of them dies at any time before judgment, the lessor may proceed against the survivors, upon suggesting the death(p) of such defendant upon the plea roll : the suggestion need not also be entered upon *nisi prius* roll ; for it is sufficient if it there appear to the judge, what he is to try, and be-  
[ \*299 ] tween whom ; \*nor need the judgment say, *quod querens nil capiat per breve* against the dead defendant.(q)

If one of several defendants die before verdict, it is the better way to suggest his death on the roll before the trial, and to award a *venire* to try the issue against the surviving defendants ;(q) although where in such case the *venire* was awarded against all, upon suggesting the death of the one upon the roll after the verdict, the plaintiff had judgment for the whole against the others.(r) But if the lessor proceed to trial, and obtain judgment against all the defendants, without such suggestion, it is error, because there can be no verdict, or judgment, against a person not in being.(s)

The entry of the judgment, notwithstanding the death of one of several defendants, ought to be general, that the plaintiff recover  
[ \*300 ] his term in the premises against the survivors ;(t) but execution must not be taken out for more than the plaintiff has a right to recover.

(n) *Taylor v. Wilbore*, Cro. Eliz. 768.

(o) 17 Car. II. c. 8.

(p) 8 and 9 Will. III. c. 11. s. 7.

(q) *Far v. Denn*, Barr. 362.

(r) *Gree v. Rolle*, Ld. Raym. 716.

(s) *Gilb. Eject* 98.

(t) *Far v. Denn*, 1 Barr. 362.

[1] VIDE "*Revised Statutes*" of New York, Part 3, Chap. 5. Tit. 1, § 32. (Vol. 2, p. 308.) CITED, ANTE, Page 288, n. [2].

Under the 3d section of the Act of the 13th of April, 1807, [*Pennsylvania*,] in case of the death of a party in ejectment, the person next in interest may be compelled to appear. *Darnes vs. Welsh*, 7 Serg. & R. Rep. 203.

It seems, that if the defendant make a joint defence for the whole land demanded, and one of them die, execution may be given of the whole, because the whole interest comes by survivorship to the others, and therefore the plaintiff hath still persons before the court to defend the whole; but that where each of the defendants makes a defence for part only, the plaintiff, upon the death of one of them, must not take out execution for the party in his possession, because they are in the nature of distinct defendants, and consequently, as to that part which was defended by the person deceased, there is no person in court against whom judgment can be given, or execution taken out.(u)

If an ejectment be brought against baron and *feme*, and the plaintiff have a verdict against *both*, but, before judgment, the husband dies, the plaintiff, on suggesting his death, may have judgment against the wife; because (having been found guilty of the trespass) she must have obtained the unlawful possession jointly with her husband, or have had the whole possession in her own right; and in either case, the possession is wholly in her on the death of her husband.(v)

#### OF THE COSTS.[1]

(u) Gilb. Eject. 98.

*Roukeley*, 1 Roll. 14.

(v) *Rigley v. Lee*, Cro. Jac. 356. *Lee v.*

[1] An action of Ejectment was referred to arbitration, and the reference which was confined to that action, stated, that if the arbitrator should award that the plaintiff had any cause of action, he should have costs as in a Court of law. The arbitrator, by his award, directed the defendant to deliver up the premises, and pay the costs of the action, and a sum of money to the plaintiff for the loss of rent during the time the defendant held possession. He also directed the parties to execute general mutual releases. On a motion for an attachment against the defendant for the sum awarded to the plaintiff *Held*, that the award was in that respect good, although the arbitrator did not find in terms that the plaintiff had any cause of action; and also, that if the award were bad as to the direction of mutual release, that would not vitiate the whole award. *Doz ex dem. Williams vs. Richardson*, 8 Taunt. Rep. 697.

Where a person is made a lessor against his consent, and the nominal plaintiff afterwards becomes nonsuit, such lessor is not liable for costs; but the plaintiff's attorney, who used the name of such person as lessor without his authority, is liable. *The People vs. Bradt*, 6 Johns. Rep. 318.

If the name of a person be used as lessor, without his consent, it may be struck out, on application to the Court. *Jackson ex dem. Goodrich & Al. vs. Ogden & Al.* 4 Johns. Rep. 140.

Where a lessor was brought up on an attachment for the non-payment

When the action is undefended, and judgment is entered against the casual ejector, the only remedy which the lessor of the plaintiff has for his costs, is an action for mesne profits, in which, at the discretion of the jury, they are recoverable as consequential damages.

When the party interested appears and enters into the consent rule, and afterwards at the trial refuses to confess, he is liable, upon such consent rule, to the payment of costs, and an attachment may be issued against him if he refuse or neglect to pay them ;(w)[1] but no writ of *fiery facias*, or *capias ad satisfaciendum*, will in this case lie, because the judgment in the ejectment is against the casual ejector.(x)

When there are several defendants, some of whom appear at the trial and confess, but others do not appear, and a verdict is found against those who do appear, each defendant is liable for the whole costs, and

(w) *Turner v. Barnaby*, 1 Salk. 239.

(x) *Goodright v. Vice*, Barn. 182.

of costs, and he denied that he ever consented to have his name used in the action ; the court said, that they could not receive his denial in bar of the attachment, nor decide between the contradictory affidavits of the party and the attorney ; but the party must pay the costs, and take his remedy over against the attorney who inserted his name as lessor ; but they stayed the proceedings, to give the party an opportunity to bring his action against the attorney, and to try the truth of the allegation. *The People vs. Bradt*, 7 Johns. Rep. 539.

It is too late, after trial, to move that the lessors of the plaintiff, who were infants, file security for costs, *nunc pro tunc*. *Jackson ex dem. Ewing & Al. vs. Bushnell*, 13 Johns. Rep. 330.

[1] On an application for an attachment for costs, on nonsuit, for not confessing *Lease, Entry and Ouster*, the affidavit must show that there was authority from the lessor to demand the costs of the tenant. *Jackson ex dem. Cramer vs. Stiles*, 3 Caines' Rep. 140.

Ejectment and judgment for costs, against the plaintiff. Presenting the lessor of the plaintiff with the *Ca. Sa.* and serving him with the consent rule, and demanding the costs, are not enough to warrant an attachment, but the taxed bill should be served, by shewing him the original and delivering a copy. *The People vs. Honsenfratts*, 3 Cowen's Rep. 26.

A female lessor of the plaintiff in an action of Ejectment, is not exempt from an attachment for non-payment of the defendant's costs, where they do not exceed fifty dollars. *Jackson ex dem. Vrooman & Al. vs. Haines*, 2 Cowen's Rep. 462.

The Statute exempting females from imprisonment on execution, does not apply to such a case. *Ibid.*

the plaintiff's lessor may tax them all against any one or all of the defendants at the same time; that is to say, upon the *postea* against those who appear, and upon the consent rule against those who do not appear; and if after satisfaction from one defendant for the costs, he take out execution against another, the Court will interfere, to prevent it. But it seems he cannot separate the costs, and tax part of them against one defendant, and part against another. (y)[2]

If the lessor of the plaintiff die before the commission-day of the assizes, and the plaintiff be non-suited by reason of the defendant's refusal to confess, the lessor's representative cannot recover any costs; because the consent rule is merely personal, and does not extend to the representative: (z)[3] but where the plaintiff's lessor died after the trial, the defendant was compelled by the Court to pay to his \*representative the costs, which had been taxed by consent [ \*302 ] upon the consent rule. (a)

When the tenant appears, and there is a verdict and judgment against him, execution may be taken out thereon for the costs, [1] as in ordina-

(y) *Thrustout, d. Wilson, v. Foot*, B. N. P. 335. S. C. Barn. 149.

(a) *Goodright v. Holton*, Barn. 119. *Post*, 321.

(z) *Thrustout v. Bedwell*, 2 Wils. 7.

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[2] If the landlord, after being made a defendant in Ejectment in room of the tenants, be afterwards withdrawn, and the tenants admitted defendants in his stead, *with the consent of the Lessor of the Plaintiff*, and by their attorney they plead, &c.; their attorney though originally employed by the landlord, cannot afterwards make an agreement binding the landlord to pay the costs, in the event of a judgment against them; it not appearing that the attorney was, either verbally or in writing, authorized by the landlord to make such agreement. *Herbert vs. Alexander*, 2 *Call's Rep.* 498.

Where there were several Ejectments by one plaintiff, against different defendants, it was ruled that a jury of view appointed for each suit should be paid for each. *Wilcox vs. —*, 1 *Hayw. Rep.* 484.

[3] Where the lessor of the plaintiff having entered into the common rule to pay costs, died between the commission day and the trial, and the plaintiff was nonsuited on the merits; *Held*, that the executor of the lessor was not liable to pay the costs. *Doe ex dem. Paine vs. Grundy*, 1 *Barnew. & Cress. Rep.* 284.

[1] In Ejectment, the execution for costs against the defendant, properly issues in the name of the nominal plaintiff alone. *Brown vs. Dement*, 9 *Cowen's Rep.* 263.

To obtain leave to enter into the consent rule specially, the defendant in Ejectment must apply to the Court, and is, therefore, entitled to have the

ry cases ; and the lessor of the plaintiff may have a *capias ad satisfaciendum*, or a *feri facias*, for the costs, and an *habere facias possessionem* for the possession, separately, or in one writ at his pleasure.(b)

When the judgment in ejectment is against a *feme sole*, who marries before execution, the plaintiff's lessor should sue out an *habere facias possessionem* in the maiden name of the defendant for the land, and then proceed by *scire facias* against the husband and wife for the costs.(c)

When the landlord is made defendant without the tenant, the judgment to recover the possession is against the casual ejector ; but, nevertheless, as there is a judgment in existence against the landlord, execution may be taken out thereon for the costs.(d)

It may be collected from the case of *Gulliver v. Drinkwater*,(e) that independently of these remedies, the lessor may, in all cases, recover the amount of his taxed costs(f) in an action for mesne profits ; but that the Court will not interfere to assist him, if the jury do not include such costs in their damages, when the lessor might have proceeded for them in a different manner.

[ \*303 ] \*When the proceedings are in the Court of King's Bench, and a verdict is found for the defendant, or the plaintiff is nonsuited for any other cause than the defendant's not confessing lease, &c. the defendant must tax his costs on the *postea*, as in other actions, and sue out a *capias ad satisfaciendum*, or *feri facias*, for the same against the plaintiff ;[1] and if, upon showing this writ under seal to the

(b) Appendix, No. 36, 37, 38, 39, 40.

(d) Appendix, No. 35.

(c) *Doe, d. Tuggart, v. Butcher*, 3 M. & S. 557.—Appendix, No. 42.

(e) 2 T. R. 261.

(f) *Doe v. Davis*, 1 Esp. 358.

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costs of such application taxed in his final bill of costs, if he be successful. *Jackson ex dem. Prinder vs. Lytle*, 4 Cowen's Rep. 16.

So if the plaintiff discontinue. *Ibid*.

[1] To warrant an attachment against the lessors of the plaintiff for not paying costs on judgment for the defendant upon verdict, a *Ca. Sa.* against the nominal plaintiff for the costs must first be exhibited. *The People vs. Merritt*, 1 Cowen's Rep. 415.

lessor, serving him with a copy of the consent rule, and demanding the costs,[2] the lessor do not pay them, the Court will on an affidavit of the facts, grant an attachment against him.(g)

When the proceedings are in the Court of Common Pleas, it is the practice in such case for the prothonotary to tax the costs upon the *postea*, and mark them upon the consent rule. This rule is then shown to the plaintiff's lessor, and at the same time the costs are demanded of him by the defendant personally, or by his attorney named in the rule; and, upon affidavit of such demand, and of the lessor's refusal to pay the costs, an attachment may be obtained.(h)

\*When there are several defendants and one or more of them [ \*304 ] is, or are, acquitted by the verdict, he, she, or they, will, by the provisions, of statute 8 & 9 W. and M. c. 11. be entitled to costs, unless the judge shall certify in open court, that there was good cause for making such person or persons defendant or defendants.(i)

When the lessor of the plaintiff is a peer, no attachment will be granted against his person; but the Court will grant a rule to show

(g) *Tully v. Baily*, M. 6 Geo. II.

(h) Imp. C. B. 5 Ed. 654. In a recent case in the Common Pleas, in which the parties had pursued the practice of the Court of King's Bench, *Mansfield*, C. J. expressed a hope that nothing so absurd as a *capias ad satisfaciendum* against the nominal plaintiff, would ever again be heard of. *Doe, d. Prior*, v.

*Salter*, 3 Taunt. 433.

(i) The provisions of this statute seem scarcely applicable to the present mode of conducting ejectments, for how can it be said, that he who was made a defendant at his own request, was made so without good cause!

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[2] The demand of costs under the rule *Nisi*, for judgment as in case of nonsuit in Ejectment, may be made upon any one of the lessors, or (*as it seems*) of the plaintiff's attorney. *Jackson ex dem. Thompson & Al. vs. Thompson & Al.*, 7 Cowen's Rep. 426. *Gilliland vs. Morrell*, 1 Caines' Rep. 154.

But it must not be made upon the Agent of the Attorney. *Gilliland vs. Morrell*, 1 Caines' Rep. 154.

A disseisee recovered judgment against the heirs of the disseisor in a writ of entry, in which they pleaded that they did not disseise, and re-entered on his writ of seisin within five years from the disseisin by the ancestor. *Held*, that the heirs were liable in trespass for the *mesne* profits accruing after the commencement of the writ of entry, (and so, *It seems*, they would have been, if they had been purchasers,) but not for those accruing between the descent cast, and their entry. As to those accruing between their entry and the commencement of the writ of entry—*Quere*, *Emerson vs. Thompson & Al.*, 2 Picker. Rep. 473.

cause, why an attachment, as to his goods and chattels, should not be issued, and, if necessary, will make that rule absolute.(j)

If the lessor of the plaintiff die after issue joined and before trial,[1] or even after trial and before payment of costs, the defendant cannot recover his costs against the representative, the consent rule being, (as already mentioned,) merely personal; and it seems immaterial, whether the defendant's claim arises from a verdict in his favor, or from the plaintiff's being nonsuited upon the merits.(k)

In a case where baron and *feme* were lessors in ejectment, and the baron died after entering into the rule, the *feme* was held liable to the payment of the costs; because they were to be paid by the lessors of the plaintiff, and both of them were in the lease.(l)

Where the lessor of the plaintiff was an infant, and his [ \*305 ] \*lessee was nonsuited, and 50*l.* costs were given to the defendant, and the infant's father who prosecuted the suit, was dead, the Court made a rule, that the lessor should pay the costs: yet, says the book, it was doubted in this case because of his infancy; but if the fa-

(j) *Thornby v. Fleetwood*, Cas. Pr. C. P. 7.

d. *Lintot, v. Ford*, 2 Smith, 407.

(k) *Thrustout v. Bedwell*, 2 Wils. 7. Doe,

(l) *Morgan v. Stupely*, 1 Keb. 827.

[1] The death of the lessor of the plaintiff previous to the judgment in Ejectment, is no ground for a writ of error *Coram Nobis*, notwithstanding that circumstance was not stated in the record, and no security for the costs was given; because an ejectment does not abate by the death of the lessor of the plaintiff. *Purvis vs. Hill*, 2 Hen. & Munf. Rep. 614.

Where the lessor of the plaintiff in Ejectment dies, pending the suit, judgment is to be rendered as if he were still living, and possession is to be given under the control of the Court. *Mooberry & Al. vs. Marye*, 2 Munf. Rep. 453.

In Ejectment, if the lessor of the plaintiff die pending the suit, security for the costs must be given. *Carter vs. Washington & Al.*, 2 Hen. & Munf. Rep. 31. In the case of *Medley vs. Medley*, 3 Munf. Rep. 191, the Court having decided that an appeal from a judgment in Ejectment did not abate by the death of the lessor of the plaintiff, notwithstanding such lessor claimed the land for life only, reserved to the appellant the liberty to move for security for costs, without expressing an opinion of the propriety of his doing so. No motion for that purpose was made, and the judgment was afterwards affirmed without it. But from the cases of *Carter vs. Washington & Al.*, 2 Hen. & Munf. Rep. 31, and *Purvis vs. Hill*, *Ibid.* 614, it appears that security for costs, if required, must be given; but it is not error to proceed without it, if not required.

ther had been alive, the Court would have made him pay the costs, or, if he had left assets, his executor. The question was adjourned.(m)

If the lessor of the plaintiff abandon the action after the appearance of the tenant, or landlord, and refuse to join in the consent rule, he is held not liable for the defendant's costs, upon the principle, that until he has put his signature to the rule, he has not consented to proceed against the new defendant.(n)[1]

If the lessor of the plaintiff sue in *forma pauperis*, he will be dispaupered in case of vexatious delay ; but it does not seem, that the Court will also compel him to pay the defendant's costs.(o)

When there are several defendants, the lessor of the plaintiff has his election to pay costs to which defendant he pleases.(p)

#### OF THE EXECUTION.

When the lessor of the plaintiff prevails, he may enter \*peaceably upon the premises recovered, without any writ of [ \*306 ] execution,[1] because the land recovered is certain ;(q) but it

(m) *Anon.* 1 Freem. 373.

(p) *Jordan v. Harper*, Stran. 516.

(n) *Smith v. Barnardiston*, W. Blk. 904.

(q) *Taylor, d. Atkins, v. Horde*, Burr. 60.

(o) *Doe, d. Leppingswell, v. Trussell*, 6 88. *Anon.* 2 Sid. 155. 6. East, 505.

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[1] In Ejectment, where the lessor neglects or refuses to join in the consent rule, the Court will, on motion, order that the lessor pay the costs of the motion and join in the consent rule, within *twenty* days after service of the rule ; or that the tenant may enter a *Non Pros* ; and, that, on being *Nonprossed*, the lessor pay the costs of the defence. *Jackson ex dem. Runno & Al. vs. Stiles*, 1 Cowen's Rep. 166.

[1] Where in an Ejectment, the confession of judgment does not determine the extent of the recovery, that must be ascertained by the Court, and not by the clerk or sheriff. *Bonta vs. Clay*, 1 Litt. Rep. 28.

A lessor in Ejectment, after judgment, may enter peaceably, without a writ of possession ; the judgment is evidence of his right of entry, as between the parties and privies, so as to protect him against an action of trespass, as long as the effect of the judgment continues, *Jackson ex dem. Beekman & Al. vs. Haviland*, 13 Johns. Rep. 229.

But after the expiration of the demise laid in his declaration, he cannot proceed to enforce his judgment. *Ibid.*

Where there is a disclaimer entered for a part claimed in Ejectment, the plaintiff may take out a writ of possession of course for that part. *Squires vs. Riggs*, 2 Hayw. Rep. 150.



i more prudent to sue out the regular writ, as the assistance of the sheriff may be necessary to preserve the peace.

A defendant in Ejectment cannot, in general, transfer his possession so as to defeat execution in the Ejectment suit; nor would a sale of his right on judgment and execution protect the purchaser in his possession. *Jackson ex dem. Hills vs. Tuttle*, 9 Cowen's Rep. 233.

But otherwise where a judgment in Ejectment is obtained by *Cognovit*, after a judgment at the suit of a creditor is docketed against the defendant in Ejectment, under which his right is sold. In such case, the purchaser may hold or recover possession against the plaintiff in the Ejectment on the defendant's prior possession; and this, even though the *Cognovit* be given in pursuance of the award of arbitrators. *Ibid.*

If the jury give a general verdict for the plaintiff in Ejectment, the Court will order him to take possession of so much of the premises as he has given evidence of title to. *Jackson ex dem. Moore vs. Van Bergen*, 1 Johns. Cas. 101.

No tenant who was in possession anterior to the commencement of an Ejectment, can be dispossessed, upon a judgment and writ of possession, to which he is not a party. *Ex Parte Reynolds*, 1 Caines' Rep. 500.

And if a tenant, whose possession is distinct from that for which the action was brought, be turned out, he may have a writ of restitution, *Ibid.*

On setting aside a default against the casual ejector, and a writ of possession issued thereon, the Court will, on payment of Costs, grant a writ of restitution. *Jackson ex dem. Rosekrans vs. Stiles*, 1 Caines' Rep. 503.

If the defendant allege that the lessor of the plaintiff has taken possession of more land than was recovered by the verdict, the Court will order a restitution. *Jackson ex dem. Ostrander vs. Hasbrouck*, 5 Johns. Rep. 366.

But if the plaintiff deny the fact, he will be allowed a *Feigned Issue* to try the question. *Ibid.*

A judgment in Ejectment never executed, and under which possession has never been surrendered, does not stop the running of the Statute of Limitations. *Smith vs. Hornback*, 4 Litt. Rep. 233.

A possession taken under a judgment in Ejectment, after the expiration of the demise laid in the declaration, without the assent of the defendant, is a trespass. *Ibid.* 234.

Consent given by a defendant, without knowledge of these facts, and of the consequent extinction of right of the plaintiff in Ejectment, would make the plaintiff tenant at will, or for one year. *Ibid.* 234

If the plaintiff in an Ejectment, having recovered a judgment, convey his right and title to another, the vendee is vested with the legal right of entry, and may take possession. *Tribble vs. Frame*, 5 Litt. Rep. 187.

A judgment in Ejectment cannot be enforced without process, although the plaintiff may enter on the land without such aid, and is not thereby guilty of a trespass, notwithstanding the provision of the occupying claimant law of 1812, [*Kentucky*,] forbidding the emanation of a writ of possession, until the commissioners appointed to assess the improvements, &c. had reported. *Ibid.*

The writ of execution in an ejectment is called the writ of *habere facias possessionem*, [2] and answers to the *habere facias seisinam* in real actions : for as in the one case, the freehold being recovered, the sheriff is ordered to give the demandant *seisin* of the lands in question, so also in the other case, the *possession* being recovered, the sheriff is commanded to give execution of the *possession*. (r) [3]

When the landlord is admitted to defend the action, and the judgment is entered against the casual ejector, with a stay of execution until further order, the lessor, before he takes out execution, must move the Court for leave to do so ; and if he sue out a writ of possession without such motion, the execution will be set aside for irregularity. (s) The rule, however, for this purpose is absolute in the first instance. (t)

If the lessor of the plaintiff be divested of his right of possession between the time when his demise is laid, and the time of issuing execu-

(r) Appendix, Nos. 36 to 40.

(t) *Fenn, d. Rickatson, v. Marriott, Barn.*

(s) *Goodright, d. Howell, v. Vice, Barn.* 185.

182. Appendix, No. 35.

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[2] After the demise laid in the declaration in Ejectment is expired, no *Habere Facias Possessionem* can issue, though the execution may have been suspended by injunction. *Smith vs. Hornback*, 3 *Marsh. Rep. (Ky.)* 193.

[3] The "*Revised Statutes*" of *New-York*, Part 3, Chap. 5, Tit. 1. § 34, (*Vol. 2, p. 308.*) contain the following provision :

" § 34. The plaintiff recovering judgment, shall be entitled to a writ of possession which shall be substantially, in the following form :

" The People, &c. To the Sheriff, &c.

" Whereas A. B. has lately, in our supreme court of judicature, [or ' in the court of common pleas held in and for the county of \_\_\_\_\_, as the case may be,] by the judgment of the said court, recovered against C. D. one messuage, &c. [describing the premises recovered, with the like certainty as above provided,] which said premises have been, and are still unjustly withheld from the said A. B. by the said C. D. whereof he is convicted, as appears to us of record ; and forasmuch as it is adjudged in the said court that the said A. B. have execution upon his said judgment against the said C. D., according to the force, form and effect of his said recovery ; therefore we command you, that without delay, you deliver to the said A. B. possession of the said premises so recovered with the appurtenances ; and that you certify to, &c. at, &c. on, &c. in what manner you shall have executed this writ. [If there be costs to be collected, the proper clause may be here inserted, or a separate execution may be issued therefor.]

" Witness, &c."

A purchaser of lands *Pendente Lite*, is subject to eviction without having been made a party. *Long vs. Morton & Al.*, 2 *Marsh. Rep. (Ky.)* 40.

tion, it seems that the Court will prevent him from issuing a writ of *habere facias possessionem*, or set one aside, if issued.(u)

[ \*307 ] \*In other cases, the execution follows, of course, upon the judgment.

The writ of possession is drawn up in general terms, commanding the sheriff to give to the plaintiff, "the possession of his term, of and in the premises recovered in the ejectment;" but without any particular specification of the lands whereof he is to make execution; and as the description of the premises, in the demise in the declaration, is also too general to serve as a direction to the sheriff, it is the practice, for the lessor of the plaintiff, at his own peril, to point out to the sheriff the premises whereof he is to give him possession; and if the lessor take more than he has recovered in the action, the courts will interfere in a summary manner, and compel him to make restitution.(v)[1]

(u) *Doe, d. Morgan, v. Bluck*, 3 Camp. 447.

(v) *Roe, d. Saul, v. Dawson*, 3 Wils. 49. *Ante*, 21.

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[1] Where the plaintiff on judgment by default, against the casual ejector, on a writ of possession, took possession of the whole premises, it appearing that he had no title to three sixths, he was ordered to restore so much to the defendant. *Jackson ex dem. Sutherland & Al. vs. Stiles*, 5 Cowen's Rep. 418.

In Ejectment, where the declaration, verdict and judgment are general, the plaintiff may take possession, at his peril, to any extent which he chooses, under the writ of *Hab. Fac. Possessionem*, subject to be put right by the Court, if he take too much. *Jackson ex dem. Eden & Al. vs. Rathbone*, 3 Cowen's Rep. 291.

But where the judgment is upon a special verdict, describing the premises, the plaintiff is confined to such location, in the first instance, and the sheriff may refuse to give him possession beyond it. *Ibid*.

"In executing the writ of possession, the plaintiff acts at his peril; and "if he takes more than he has established his right to, the Court will interfere in a summary way, and compel him to make restitution." (*Per GREEN, J. delivering the Opinion of the Court.*) *Camden & Al. vs. Haskell*, 3 Rand. Rep. 465.

The Court, in their discretion, will set aside a writ of *Habere Facias Possessionem* executed, and let in a landlord to try an Ejectment on suggestion of collusion. *Doe ex dem. The Grocers' Company vs. Roe*, 5 Taunt. Rep. 205.

The practice in delivering possession of land recovered, is, for the sheriff to deliver it according to the directions of the plaintiff, who therein acts at his own peril. *Simpson's Heirs vs. Shannon's Heirs*, 5 Litt. Rep. 322.

They will, also, if circumstances require, interfere before the execution of the writ, and restrain the lessor from taking possession of more than he is entitled to. [2] As, where the lessor had declared for lands held under two separate titles, and by mistake of the judge upon the law of the case, the verdict was given for the plaintiff upon both titles, when it ought to have been entered for the defendant as to the lands comprised in one of them; the Court, after argument, granted a rule to confine the execution to those lands only, to which the lessor had a valid title. (u)

\*The sheriff, it seems, previously to the execution of the [ \*308 ] writ, may demand an indemnity from the plaintiff; (x) and when he has to deliver possession of any particular number of acres, he must estimate them according to the custom of the country in which the lands are situated. (y)

The possession to be given by the sheriff, is a full and actual possession, and he is armed with all power necessary to this end. Thus, if

(u) *Doe, d. Foster, v. Wandlass*, 7 T. R. 113, in notice. *Et vide Brooke, d. Mence, v. Baldwin*, Barn. 463.

(x) *Gilb. Eject* 110.

(y) *Roll. Ab.* 386. H. 4.

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After a judgment has been obtained in *Pennsylvania*, in an action of Ejectment for the non-payment of rent, and possession has been delivered, the Court will not, on motion, restore the possession, on tender of the rent due, particularly when the amount due is disputed between the parties. *Lessee of Camac vs. Allwine*, 1 *Wash. Circ. Ct. Rep.* 466.

[2] *Vide Jackson ex dem. Eden & Al. vs. Rathbone*, 3 *Cowen's Rep.* 291, (CITED, SUPRA, n. [1].

Several crops having been taken under an *Habere Facias Possessionem* issued on an Ejectment brought against a tenant for holding over, the Court refused a rule for the lessor of the plaintiff to pay over the value of them to the defendant, after deducting the amount of rent due. *Doe ex dem. Upton vs. Witherwick*, 3 *Bingh. Rep.* 11.

The growing crops of a tenant having been seized under a *Fi. Fa.* a writ of *Hab. Fac. Poss.*, was subsequently delivered to the sheriff, in an action of Ejectment at the suit of the landlord, founded on a demise made long before the issuing of the *Fi. Fa.* *Held*, that the sheriff was not bound to sell the growing crops under the *Fi. Fa.*, inasmuch as they could not, in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration: *Held*, also, that the sheriff had no right to allow the landlord a year's rent, under the statute of 8th Ann. c. 14, that statute contemplating an existing tenancy, which in this case, must be taken to have ceased on the day of the demise in the Ejectment. *Hodgson & Al. Assignees of Seton vs. Gascoigne*, 5 *Barnew. & Ald. Rep.* 88.

the recovery be of a house, and he be denied entrance, he may justify breaking open the door, for the writ cannot otherwise be executed.(z)

If the lessor recover several messuages in the possession of different persons, the sheriff must go to each of the several houses, and severally deliver possession thereof, (which is done by turning out the tenants;) for the delivery of the possession of one messuage, in the name of all, is not a good execution of the writ; since the possession of one tenant is not the possession of the other.(a) But when the several messuages are in the possession of one tenant only, it is sufficient if he give possession of one messuage in the name of all.(b)

When the recovery is of land, the same distinction seems to prevail; that is to say, if there be only one tenant, a delivery of any part, in the name of the whole, will be sufficient; but if there be more than one, a separate delivery of the lands in the possession of each tenant respectively must be made.(a)

[ \*309 ] If the officers be disturbed in the execution of the writ \*the Court will, on affidavit of the circumstances, grant an attachment against the party, whether he be the defendant, or a stranger;(c) and the writ is not understood to be completely executed, until the sheriff and his officers are gone, and the plaintiff is left in quiet possession.

In an old case where the sheriff returned, that in the execution of the writ, he removed all the persons, whom upon diligent search he could find on the premises, and gave peaceable possession to the plaintiff, and that, immediately after he was gone, three men, who were secretly lodged in the house, expelled the plaintiff, upon notice of which he returned to the house to put the plaintiff in full possession, but met with such resistance that he could not do it, but at the peril of his life; the Court held, that the same was no execution, and awarded a new writ.(d)

In the old authorities we find it laid down, that if the lessor, after having had possession given to him by the sheriff, and before the writ of possession has been returned and filed, be again ousted by the defend-

(z) *Semayne's case*, 5 Co. 91. (b).

(a) 1 Roll. Ab. 886. H. 2.

(b) *Floyd v. Bethill*, 1 Roll. Rep. 420.

(c) *Kingsdale v. Mann*, 6 Mod. 27. S. C. Salk. 321.

(d) *Upton v. Wells*, 1 Leon. 145.

ant, he shall have a new writ of possession, or an attachment ;[1] but that if he be ousted by a stranger, he shall be driven to another ejectment ; and the reason assigned for this distinction is, that in the one case the defendant shall never, by his own act, keep the possession which the plaintiff has recovered from him by due course of law, and in the other that, as the title was never tried between the plaintiff and the stranger, he may claim the land under a title paramount to that of the plaintiff, and therefore the recovery and execution in the former action ought not to hinder the stranger from keeping that possession to which he may have a right. It is also said, that the \*return of the writ of the execution is so much in the power of [ \*310 ] the plaintiff, that the Court will not, at the instance of the defendant, direct it to be returned ;[1] for the return is left to the discretion of the plaintiff, that he may do what is most for his own advantage, in order to have the benefit of his judgment ; the best way to effect which is, to permit him to renew the execution at his pleasure, until full execution be obtained.(e)

All these cases, however, seem to be overruled by a recent decision of the Court of Common Pleas. The lessor of the plaintiff had been put

(e) *Rex v. Harris*, Ld. Raym. 432. *Molineux v. Fulgam*, Palm. 289. *Ratcliff v. Tate*, 1 Keb 776. *Loveless v. Ratcliff*, 1 Keb. 785. *Devereux v. Underhill*, 2 Keb. 245. *Fortune v. Johnson*, Styl. 318. *Pierson v. Ta-*

*venor*, 1 Roll Rep. 353. *Davies d. Povey*, v. Doe, W. Blk. 892. *Anon.* 2 Brown, 253. *Kingsdale v. Mann*, 6 Mod. 27. S. C. Salk. 321. *Goodright v. Hart*, Stran. 321.

[1] If a plaintiff, who has recovered in Ejectment, an undivided proportion of land, and received possession thereof from the sheriff, ousts the defendant of the whole, after the return day of the *Habere Facias*, the Court will not restore the defendant in a summary way. *Gardiner vs. Schuylkill Bridge Co.*, 2 Binn. Rep. 450.

*Aliter*, if there is an ouster in fact before the return day. *Ibid.*

[1] The Court will not rule the marshal to return the *Habere Facias Possessionem*. *Penn's Lessee vs. Kline*, Circ. Ct. U. S. P. April, 1821. MS. (Cited in Coxe's Digest, p. 272)

The defendant in Ejectment cannot rule the marshal to return the *Habere Facias Possessionem*, though the plaintiff may. The reason is, that if not returned, and the plaintiff, after the writ is executed, should be again turned out by the defendant, he may, on suggestion that *Vice Comes non misit Breve*, sue out an *Alias*, and be restored to his possession.

In case he is turned out by a stranger, he cannot pursue this course, but must resort to his Ejectment or forcible entry *United States vs. Slaymaker*, Circ. Ct. U. S. P. October, 1821. MS. (Cited in Coxe's Digest, pP. 372, 373.)

into possession by virtue of a writ of *habere facias possessionem*, on the 22d day of February, 1806, which writ had never been returned by the sheriff; and on the 10th day of October, 1807, whilst he continued in possession, the person, against whom he had recovered the premises, entered into the house by force, and resisted with violence all attempts to regain the possession. Upon these grounds, a new writ of *habere facias* was moved for, and the case of *Radcliff v. Tate*,<sup>(f)</sup> was cited: but "the Court denied the authority of that case, and held, that possession having been given under the first writ, the sheriff ought to have returned, 'that he had given possession,' and that the plaintiff could not afterwards have had another writ; an *alias* cannot issue after a writ is executed.[2] If it could, the plaintiff, by omitting to call on the sheriff to make his return to the writ, might retain the right of suing out a new *habere facias possessionem*, as a remedy for any trespass which [\*311] the same tenant might commit with-\*in twenty years next after the date of the judgment;"<sup>(g)</sup> and the rule was refused.

If the lessor neglect to sue out his writ of possession for a year and a day after judgment, he must revive the judgment by *scire facias*[1] as in

(f) 1 Keb. 779.

(g) *Doe v. Roe*, 1 Taunt. 55.

[2] If a writ of *Habere Facias Possessionem* be once returned executed, no *alias* can issue, for then the execution is of record, and the writ is *Functus Officio*. *United States vs. Slaymaker*, *Circ. Ct. U. S. P.* Oct. 1821. *MS.* (CITED in *Coxe's Digest*, p. 273.)

If an *Alias* issue on a suggestion of *Vice Comes non misit Breve*, it is an offence in a party to resist its execution, but not so if the first writ had been returned executed, for then the *Alias* was irregular. *Ibid.*

The writ of *Habere Facias Possessionem*, cannot be executed after the return day, and resisting an attempt thus irregularly to execute it, is not criminal. *Ibid.*

[1] Upon a judgment in Ejectment, if execution of the writ of *Habere Facias Possessionem* be prevented for several years by injunction, the plaintiff is entitled to the writ, on motion, upon a rule to shew cause, without a *Scire Facias*; provided, not more than a year has elapsed since the affirmance by the Court of Appeals of the decree dissolving the injunction, and dismissing the bill in Chancery. *Noland vs. Seekright, Lessee of Cromwell*, 6 *Munf. Rep.* 185.

In such case, if the term laid in the declaration have expired, pending the proceedings on the injunction, the Court to which the motion is made for the writ of *Habere Facias Possessionem*, may cause the term to be enlarged, and award the writ upon a rule to shew cause served upon the defendant. *Ibid.*

other cases; and when the judgment is against the casual ejector, the ter-tenant must be joined in the writ.(h)

When a sole defendant in ejectment dies after judgment, and before execution, it has been doubted whether a *scire facias* is necessary, because the execution is of the land only, and no new person is charged;(i) but the surer method is, notwithstanding, to sue out a *scire facias*. And as a *scire facias* for the land must issue against the ter-tenant, whoever he may be, it will also be necessary to sue out another *scire facias* for the costs against the personal representative, unless he be himself the ter-tenant.(j)

When the judgment in ejectment is against a *feme sole*, who marries before execution, the plaintiff's lessor should sue out an *habere facias possessionem* in the maiden name of the defendant for the land, and then proceed by *scire facias* against the husband and wife for the costs.(j)

If the lessor of the plaintiff die after the *teste* of the writ, but before it is actually sued out, it is not necessary to revive the judgment by *scire facias*; and as he is not a party on the record, it seems no *scire facias* would be necessary, \*if he die before the *teste* of [ \*312 ] the *habere facias possessionem*, although the case of *Doe, d. Beyer, v. Roe*,(k) has certainly left this point somewhat doubtful.

(h) *Withers v. Harris*, Ld. Raym. 806.  
—Appendix. No. 42.

(i) *Per Holt, C. J. Withers v. Harris*, Ld. Raym. 806. *Sed vide Proctor v. Johnson*, 2 Salk. 600. S. C. Ld. Raym. 669.

(j) *Doe, d. Tuggart, v. Butcher*, 3 M. & S. 557.

(k) *Burr*, 1970.

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In a *Scire Facias*, brought to obtain an execution on a former judgment in Ejectment, it is incompetent for the defendant to controvert the title determined by such judgment. *Bradford vs. Bradford*. 5 *Connect. Rep.* 127.

To a *Scire Facias*, to revive a judgment in Ejectment, for the term and damages, the defendant cannot plead a conveyance by the lessor of the plaintiff, made subsequent to the judgment. *Lessee of Penn vs. Klyne & Al.*, 1 *Peters' Circ. Ct. Rep.* 446.

After a conveyance by the lessor of the plaintiff to a third person, of land for which judgment had been obtained, a *Scire Facias*, or a *Habere Facias*, must issue in the name of the original plaintiff. *Ibid.*

[2] A judgment in Ejectment for the term, damages and costs, cannot be revived by *Scire Facias* against the heirs alone, the personal representatives must also be made defendants. *Mitchell vs. Smith*, 1 *Litt. Rep.* 245

A *Scire Facias* cannot issue against the representatives of a deceased defendant without making the survivors parties. *Ibid.* 244.



## OF THE WRIT OF ERROR.[1]

A writ of error in ejectment cannot be brought in the name of the casual ejector,(1) and consequently it will not lie until after verdict; for, be-

(1) *Roe, d. Humphreys, v. Doe*, Barn. 181.      dern practice. *Ante*, chap. VI.

This principle is of course limited to the mo-

[1] The "*Revised Statutes*" of *New-York*, Part 3, Chap. 9 Tit. 3, §§ 1, 2, 3, 5, 6, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 33, 37, 38, 39. (*Vol 2, pp 591, 592, 594, 595, 596, 597, & 598,*) contain the following provisions:

"§ 1. Writs of error, upon any final judgment or determination, in all civil cases, are writs of right, and shall issue of course out of the court in which they may by law be made returnable, in vacation as well as in term, subject to the regulations prescribed by law.

"§ 2. Writs of error must be brought,

"1. By the party against whom the judgment complained of was rendered:

"2. In case of his death, by his executors or administrators, if the judgment was to recover any debt, or damages only, or to recover any interest in lands declared by law to be personal assets: or,

"3. In case of the death of such party, if the judgment was for the recovery of real estate or the possession thereof, or the title to real estate was determined thereby, by the heirs or devisees of such deceased party, to whom such estate was devised or descended, or might have descended:

"4. By any person having an estate in reversion, or remainder, in any real property, which shall have been recovered, or the possession of which shall have been recovered, in any action relating to property, brought against any tenant for life, or for years, in which action such person was not a party; and such writ may be brought, within the time prescribed by law, by such person, as well during the life time of such tenant as after his death.

"§ 3. Any party in whose favor any judgment may have been rendered, upon which no execution shall have been issued, and which shall not have been in any way satisfied, in whole or in part, and after his death, his personal representatives, heirs or devisees, may bring a writ of error to reverse such judgment, in the same cases as if such judgment had been rendered against such party."

"§ 5. If a judgment be recovered against a female, and she afterwards marry, or if a judgment be recovered against a married woman, a writ of error may be brought thereon, by her and her husband jointly.

"§ 6. If a judgment shall have been obtained against several persons, and one or more of them die, a writ of error may be brought thereon by the survivors."

"18. The proceedings by *scire facias* to summon persons not named in any writ of error, and to sever them, and all other proceedings for that purpose, heretofore accustomed, are hereby abolished.

"§ 19. Writs of error must be brought against the same person who was party to the judgment on which it is brought; or in the case of his death,

fore appearance, the casual ejector is the only defendant in the suit, and, after appearance, the new defendant is bound by the terms of the

" 1. If such judgment was for the recovery of any debt or damages only, against his executors or administrators :

" 2. If the judgment was for the recovery of any interest in lands declared by law to be personal assets, against the executors or administrators of such deceased party, or if such interest shall have been conveyed by such deceased party, previous to the bringing of such writ, then against the actual occupants thereof under such conveyance :

" 3. If the judgment was for the recovery of real estate or the possession thereof, or in any action by which the title to real estate was determined, against the heirs of such person, to whom such real estate descended, or against the devisees of such estate ; or if such estate shall have been conveyed by such deceased party previous to the bringing of such writ of error, then against the actual occupants thereof, claiming under such conveyance.

" § 20. If the party to such judgment be a female, and shall have married, the writ of error must be brought against her and her husband jointly.

" § 21. All writs of error upon any judgment or final determination, rendered in any cause, in any court of law and of record in this state, shall be brought within two years after the rendering of such judgment or final determination, and not after ; except in cases specified in the two next sections.

" § 22. If any person against whom such judgment or determination shall be made, shall be at the time, either,

" 1. Within the age of twenty-one years : or,

" 2. Insane : or,

" 3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence, for any term less than for life : or,

" 4. A married woman :

" The time during which such disability shall continue, shall not be deemed any portion of the time above limited for bringing a writ of error ; but such person may bring such writ after the time so limited, and within two years after such disability removed.

" § 23. If the person entitled to bring such writ, shall die, during the continuance of any disability specified in the preceding section, his heirs, devisees, executors or administrators, entitled by law to prosecute such writ, may bring the same, after the time herein limited for that purpose, and within two years after such death.

" § 24. But the existence of any disability specified in the preceding sections, shall not authorise the bringing of a writ of error upon any judgment, after the expiration of five years from the time of rendering the same.

" § 25. Writs of error shall be allowed as follows :

" 1. Writs of error to remove judgments from any court of common pleas, or from the superior court of law for the city and county of New-York, may be allowed by a justice of the supreme court, or by a clerk of that court, or by any officer authorised to perform the duties of a justice thereof :

consent rule to plead the general issue.(m) If also the defendant refuse at the trial to confess, &c. he will be precluded from bringing error, be-

(m) *Ante*, 282.

"2. Writs of error to remove judgments from the supreme court, to the court for the correction of errors, may be allowed by the clerk of that court, by the chancellor, by a justice of the supreme court, or by an officer authorised to perform the duties of a justice of the supreme court.

"§ 26. No writ of error shall be allowed in any case, unless the party prosecuting such writ with two sufficient sureties, or in case of the absence of such party, three sufficient sureties, shall become bound to the party against whom such writ of error shall be brought, by a bond, as herein after specified.

"§ 27. The penalty of such bond shall be as follows :

"1. If the writ be intended to operate as a stay of execution, upon any judgment for debt, damages or costs recovered in any action, the penalty shall be at least double the sum recovered by such judgment :

"2. If the writ be intended to stay execution upon a judgment in waste or in any action for the recovery of land, or the possession thereof, the penalty shall be one hundred and fifty dollars, if the writ be returnable in the supreme court, and if returnable in the court for the correction of errors, three hundred dollars, and such additional sum as shall be sufficient to indemnify the defendant in error, for the *mesne* profits of the premises recovered, during the pendency of the writ, and against waste.

"3. If the writ be not intended to operate as a stay of execution, the penalty of such bond, if the writ of error be returnable in the supreme court, shall be one hundred and fifty dollars; if such writ be returnable in the court for the correction of errors, the penalty shall be three hundred dollars.

"§ 28. The condition of such bond shall be as follows :

"1. If the writ be intended to operate as a stay of execution upon any judgment for the recovery of any debt, damages or costs, such condition shall be, that if the party prosecuting such writ shall fail to prosecute the same; or if such writ shall be quashed, or discontinued; or if the judgment for the reversal of which such writ of error shall have been brought, or any part of such judgment, shall be affirmed; then that such party will pay and satisfy the debt or damages and costs recovered by such judgment, which he shall be liable to pay, or such part of such recovery as shall be affirmed, if a part only be affirmed; and all costs and damages which shall be awarded by the court to which the writ of error shall be returnable, upon the judgment so affirmed.

"2. If the writ be intended to stay execution upon a judgment in waste or for the recovery of land or the possession thereof the condition of such bond, in addition to the matters herein before prescribed, shall further provide, that the plaintiff in error shall also pay and satisfy all damages that may be recovered by the defendant in error, for the *mesne* profits of the premises recovered, or for any waste to be committed thereon, together with the costs of the proceedings for the recovery of such damages :

"3. If the writ be not intended to operate as a stay of execution, the condition of such bond shall be, that if the party prosecuting such writ shall fail to prosecute the same, or if such writ be quashed or discontinued ;

cause the plaintiff will then be nonsuited as to him, and the judgment will be entered against the casual ejector. (m)

(m) *Ante*, 232.

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or if the judgment on which such writ shall be brought, or any part thereof, be affirmed, that such party will pay the costs, if any, and the damages which shall be awarded by the court to which the writ of error shall be returnable.

"§ 29. The party applying for the allowance of any writ of error, shall state to the officer applied to, whether such writ be intended to operate as a stay of execution, or not; and if the proper bond be executed to justify such stay of execution, the officer allowing the writ, shall endorse thereon, with his allowance thereof, an order to stay proceedings on the execution upon such judgment, if one shall have been issued, or to stay the issuing of one, if none have been issued, until judgment shall be rendered on such writ of error.

"§ 30. If no execution shall have been issued, the service of such order shall stay the issuing thereof; and if an execution shall have been issued, and not fully executed, the service of such order shall stay the further execution thereof, at whatever time such order shall have been made or served. But no writ of error shall stay the issuing of an execution, or stay proceedings on an execution issued, unless such order shall have been made and served.

"§ 32. The party prosecuting the writ of error, shall, at the time of serving such writ on the clerk of the court in which the judgment was given, file with such clerk, the bond executed upon the allowance of such writ, together with a certificate signed by a counsellor of the supreme court, stating that he has examined the record and proceedings in the cause intended to be removed by such writ, or copies thereof; and that in his opinion there is error in substance therein.

"§ 33. No return shall be made to any writ of error, unless such certificate and bond, in the cases where by the provisions of this article a bond is required, be filed therewith; and if the clerk of any court shall make return to any such writ contrary to the provisions of this section, such return shall be void, and he shall forfeit to the party against whom such writ of error shall have been brought, two hundred and fifty dollars; and shall also, upon conviction thereof, forfeit his office."

"§ 37. After the bringing of a writ of error, and the giving of the bond required by law, upon any judgment for the recovery of land or the possession of land, the party in whose favor such judgment shall have been given, shall not proceed for the recovery of any *mesne* profits for the lands recovered, until the determination of such writ of error.

"§ 38. If the plaintiff in such writ of error shall suffer a discontinuance or become non-suited, or the judgment be affirmed, the defendant in error may proceed to file a suggestion of his claim to *mesne* profits, in the same manner as he might have done if no writ of error had been brought; and in such suggestion, he may also include his claim for *mesne* profits during the pendency of the writ of error, and for any damages arising from any waste committed after the giving of such first judgment.

"§ 39. Such suggestion shall, in all cases, be filed in the supreme court;

When indeed the landlord defends alone, and the verdict is found against him, error may be brought, notwithstanding that the [ \*313 ] judgment, upon which the execution is <sup>sues</sup>, is entered against the casual ejector; (m) for a judgment is also in existence against the landlord, and upon that judgment the writ of error may be taken out in the landlord's name. To enable him, however, to proceed with the writ of error, he must show the error brought, as cause against the plaintiff's rule for taking out execution against the casual ejector; (n) and if he omit to do this, and suffer a regular execution to take place, the Court will not, on a subsequent motion, order the execution to be set aside. (o)

By statutes 16 and 17 Car. II. c. 8. s. 3 and 4. it is enacted, that no execution shall be staid by writ of error, upon any judgment after verdict in ejectment, unless the plaintiff in error shall become bound in a reasonable sum to pay the plaintiff in ejectment all such costs, damages, and sums of money, as shall be awarded to such plaintiff, upon judgment being affirmed, or an a nonsuit, or discontinuance had; and, in case of affirmance, discontinuance, or nonsuit, the Court may issue a writ to inquire, as well of the mesne profits, as of the damages by any waste committed after the first judgment; and are upon the return thereof to give judgment, and award execution for the same, and also for costs of suit.

The words of this statute seem to render it necessary for the plaintiff in error to be *personally* bound; [1] but by a reasonable construc-

(m) *Ante*, 284.

(o) *George, d. Bradley, v. Wisdom*, Burr.

(n) *Ante*, 305.

756.

and the like proceedings in all respects shall be had upon the judgment of affirmance, and with the like effect, upon such suggestions as are prescribed in the fifth Chapter of this Act: and the amount of the damages for the *mesne* profits, during the pendency of the writ of error, and none other, may be recovered upon the bond given, on the suing out the writ of error.'

The defendant cannot assign as error that the writ of Ejectment is not signed by the prothonotary, if it is under seal. This defect is cured by appearance and pleading to issue, and by the act of assembly prescribing a writ of Ejectment. *Benjamin vs. Armstrong*, 2 *Serg. & R. Rep.* 292.

As in an action of Ejectment a deed under which the plaintiff claims no title, may be given in evidence to prove boundary, it is no ground for reversing a judgment in the Court of Appeals, that the inferior Court admitted a deed to be read in evidence, by which, according to law, no title to any land could pass. *Lander vs. Reynolds*, 3 *Litt. Rep.* 15.

[1] Vide "*Revised Statutes*," Part 3, Chap. 9, Tit. 3, § 26, (*Vol.* 2, p. 595.) CITED, *ANTE*, Page 312, n. [1.]

tion, it is held sufficient if he procure \*proper sureties to enter [ \*314 ] into the recognisance of bail, for otherwise lessors residing in distant counties would sustain great inconvenience, and an infant lessor, or a lessor becoming a *feme covert* after action brought, would be entirely excluded from the benefit of the act.(p) But, although the surties may be examined as to their sufficiency, the plaintiff in error cannot, and, therefore, where the lessor of the plaintiff swore, that the defendant was insolvent, and also that he (the lessor) had a mortgage upon the land for more than it was worth, the Court still held, that the defendant's recognisance was sufficient to entitle him to his writ of error.(q).

The reasonable sum, in which the plaintiff in error is bound under this statute, is generally double the improved rent of the premises in dispute, and the single costs of the ejectment.(q)[1]

The writ of error does not operate as a stay of execution until bail is put in, which cannot be done until the plaintiff's lessor has taxed his costs, for until costs are taxed, the amount of the penalty of the recognisance of the bail in error cannot be fixed; and if the lessor choose to waive his taxation of costs, and proceed for his possession only, the Court will not interfere to prevent him, notwithstanding the allowance of the writ of error.(r)

In the case of *Wharod v. Smart*,(s) the defendant brought a writ of error in parliament, and the Court compelled him \*to [ \*315 ]

(p) *Barnes v. Bulmer*, Carth. 121. *Lushington v. Doe*, 7 Mod. 304. *Keene*, d. Ld.

*Keene*, d. Lord Byron, v. *Deardon*, 8 East, 298.

*Byron*, v. *Deardon*, 8 East, 298.

(r) *Doe*, d. *Messiter*, v. *Dinsley*, 4 Taunt.

(q) *Thomas v. Goodtitle*, Barr. 2601,—

269.

(s) Barr. 1823.

The plaintiff in error in Ejectment is not bound to give the defendant in error notice of his entering into the recognizance pursuant to 16 & 17 Carr. 2. c. 8. s. 3. to pay costs on affirmance. *Doe*, on demise of *Webb* vs. *Goundry*, 7 Taunt. Rep. 427.

The plaintiff in error in Ejectment is not required to find bail to join in his recognizance to pay costs, on affirmance. *Ibid*.

[1] Vide "Revised Statutes," Part 3, Chap 9, Tit. 1, § 27, (Vol. 2. pp. 595, 596.) CITED, ANTE, Page 302, n. [1].

The practice has been to take a recognizance in double the annual rent of the premises, when that can be ascertained. *Doe on demise of Webb* vs. *Goundry*, 7 Taunt. Rep. 427.

enter into a rule "not to commit waste or destruction during the pendency of the writ of error."

When the plaintiff's lessor proceeds against the bail by action on the recognisance, they are not chargeable with the mesne profits under stat. 16 and 17 Car. II. c. 1. s. 4., unless their amount has been first ascertained by writ of inquiry pursuant to the provisions therein contained.(t)

After a recovery in ejectment, the lessor of the plaintiff may peaceably enter, pending a writ of error, if he find the premises vacant; but he cannot enter by force, nor take out a writ of execution.(u)

#### OF BRINGING A SECOND EJECTMENT.

We have now traced the proceedings in this action, from the commencement to the conclusion; and it only remains to add a few remarks respecting the bringing of a new, or second ejectment.

It has already been observed, that a judgment in ejectment confers no title upon the party in whose favour it is given; and that it is not evidence in a subsequent action, even between the same parties.(v)[1]

(t) *Doe v. Reynolds*, 1 M. & S. 277.

cog. in *Withers v. Harris*, Ld. Raym. 986. 8.

(u) *Badger v. Floyd*, 12 Mod. 288. Re-

(v) *Ante*, 192.

[1] A former judgment in Ejectment against a tenant in possession, creates no estoppel to a title since acquired, by him, from one, who was not party or privy to such judgment. *Bradford vs. Bradford*, 5 Conn. Rep. 127.

A former judgment in an action of Ejectment, wherein the plaintiff declared merely, that he was "well seised and possessed of the premises," will not estop the defendant in that action from setting up, in another action, a title in fee. *Ibid*.

A former judgment in Ejectment by default in favour of the plaintiff, creates no estoppel to the defendant's title; because if the defendant had pleaded the general issue and there had been a verdict for him, it would have created no estoppel to the plaintiff's title; and it is an indispensable requisite of an estoppel that it be reciprocal. *Ibid*.

Whether the verdict and judgment in one action of Ejectment is a bar to a recovery in another? *Hammond vs. Ridgely's Lessee*, 5 Harr. & Johns. Rep. 245, 267.

Though one has recovered in an Ejectment, yet the recovery is not conclusive upon the defendant or those claiming under him. And, accordingly, where, after a recovery in Ejectment, the defendant's title was sold on judgment and execution, and the purchaser brought Ejectment against the former recoverer in possession, who set up a mortgage against the former

From these circumstances it is manifest, that the judgment can never be final: and that it is always in the power of the party failing, whether claimant or defendant, to bring a new action.[2] The structure of the record also renders it impossible to plead a former recovery in bar of a second ejectment:[3] for the plaintiff in the suit is only a fictitious person, and as the \*demise, term, &c. may be laid many [ \*316 ] different ways, it never can be made appear that the second ejectment is brought upon the same title as the first.

It is said by Mr. Sergeant *Sellon*, in his Practice of the Courts,(w) "that it has sometimes been attempted in Chancery, after three or four

(w) 2 Sell. Prac. 144.

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defendant, which proved to be usurious, and therefore void: *Held*, that the purchaser should recover. *Jackson ex dem. Hills vs. Tuttle*, 9 Cowen's Rep. 233. ✓

A verdict and judgment in Ejectment, is never conclusive, even between the immediate parties, except in an action for *mesne profits*. (*Per COLDEN, Senator.*) *Hopkins vs. M'Laren*, 4 Cowen's Rep. 667.

[2] After a plaintiff has obtained judgment in Ejectment for a moiety of land, he may sustain a new Ejectment for the whole, against the same parties, without taking possession, or suing out a writ of possession, or using any means to enforce the former judgment. But if a party after recovering in Ejectment, harass the defendant by a new Ejectment, when he is willing to surrender, such defendant might obtain relief on motion. *Rambler & Al. vs. Tryon & Al.*, 7 Serg. & R. Rep. 90.

One verdict and judgment, and one award of arbitrators, under the act of 20th March, 1810, [*Pennsylvania*.] in favour of the same party, are not a bar to another Ejectment by the other party. *Ives & Al. vs. Lett & Al.*, 14 Serg. & R. Rep. 301.

[3] Two verdicts and judgments, and seventeen years acquiescence, are not a bar to an Ejectment at common law. *White & Al. vs. Kyle's Lessee*, 1 Serg. & R. Rep. 515.

Nor where several verdicts have passed in favour of one party, and the other party has accepted a lease of him, is the losing party concluded.—*Richardson vs. Lessee of Stewart*, 2 Serg. & R. Rep. 87.

But after three trials, in which similar verdicts had been found, the Court said they would stay further proceedings. *Lessee of Cherry vs. Robinson*, 1 Yeates' Rep. 521.

[And now it is provided by the act of the 13th April, 1807, Sect. IV., [4 Sm. Laws., 477.] that two verdicts in Ejectment on the same side, and judgment rendered thereon shall be conclusive.]

No verdict and judgment in Ejectment, can be relied on as a bar to a subsequent Ejectment, though for the same land, and between the same defendants and lessors of the plaintiffs, the fictitious plaintiffs being not the same *Pollard vs. Baylors & Al.* 6 Munf. Rep. 433.



ejectments, by a *bill of peace* to establish the prevailing party's title; yet it hath always been denied, for every *termor* may have an ejectment, and every ejectment supposes a new demise, and the *costs* in ejectment are a recompense for the trouble and expense to which the possessor is put. But that where the suit begins in Chancery, for relief touching pretended incumbrances on the title of lands, and the Court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the Court, the Court hath ordered a *perpetual injunction* against the defendant, because there the suit is first attached in that court, and never began at law; and such precedent incumbrances appearing to be fraudulent, and inequitable against the possession, it is within the compass of the Court to relieve against it." It should seem, however, from the cases of *Barefoot v. Fry*, (x) and *Leighton v. Leighton*, (y) that Courts of equity will sometimes interfere and grant perpetual injunctions, when the ejectments have been commenced in the usual way at the common law. And in one case, where upon a most vexatious prosecution of ejectments, the Court of Chancery refused to grant a perpetual injunction, upon an appeal to the House of Lords, the injunction was allowed. (z)

(x) *Bamb.* 158.(y) 1 *P. Wms.* 671.(z) *Earl of Bath v. Sherwin*, Bro.Cas. Parl. 270.

## CHAPTER XII.

OF STAYING THE PROCEEDINGS IN THE ACTION OF  
EJECTMENT.

THE discretionary power exercised by the Courts in the regulation of ejectments, is frequently called forth by applications from the defendant, to stay the proceedings in the action ;[1] and a separate consideration of the cases in which these applications have been granted, seems preferable to intermixing them with the detail of the regular practice.[2]

When the ejectment is brought on the forfeiture of a lease, the proceedings will be staid upon the application of the tenant, until the lessor of the plaintiff has delivered particulars of the breaches of covenant, on which he intends to rely : and a summons for this purpose will be granted before the tenant has appeared to the action, or entered into the consent rule.

When the lessor of the plaintiff is an infant, the Court will stay the proceedings until security be given for the costs, unless a responsible

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[1] In Ejectment, where the tenant after suit brought offers to surrender the premises, to pay the costs, and to enter into a stipulation as to *mesne* profits, giving the plaintiff the same rights as if judgment was entered against the casual ejector, the Court will stay the proceedings. *Jackson ex dem. Wood vs. Stiles*. 3 *Wend. Rep.* 429.

[2] Pending the action, the premises were sold under a mortgage, and purchased by *M.*, to whom the defendant, for a valuable consideration, delivered possession, and afterward went to the Clerk's office and confessed judgment, on which a *Habere Facias Possessionem* was issued, and possession delivered to the plaintiff. On motion, the judgment and execution were set aside, and the cause reinstated ; but as the substitution of *M.*, as the defendant, would have ousted the Court of its jurisdiction, the Court ordered that the suit should stand in the name of the original parties, and that *M.* should give surety for the costs, &c. *Lessee of Thomas vs. Newton*, 1 *Peters' Circ. Ct. Rep.* 444.

person has been made the plaintiff in the suit, or the father, or guardian, undertake to pay them; but an inquiry into these facts should [ \*318 ] be made previously to the application.(a) The proceedings will also be staid until security be given for the costs, when the lessor resides abroad;(b)[1] and, in a case where an ejectment was brought upon the demise of a person resident in Ireland, the Court of King's Bench staid the proceedings until security should be given for the costs; although it was an ejectment brought under the direction of the Court of Chancery, where the bill was retained until after the trial of the ejectment, and security had already been given there to the amount of 40*l*.(c) In like manner, if the plaintiff's lessor should die pending the action, it seems that the Court, although they cannot stay the proceedings *in toto*, will not suffer the suit to proceed, unless security be given for the costs.(d) And when the lessor is unknown to the defendant, the latter may demand an account of his residence, or place of abode, from the lessor's attorney, and if he refuse to give it, or give a fictitious account of a person who cannot be found, proceedings will be staid until security for the costs be given.(e) But these are the utmost limits to which the Courts will go in granting rules of this nature; and an application has been refused founded on the poverty of the lessor,(f) and also one in which it appeared that an ejectment had previously been brought in another Court and abandoned, and that the lessor had been obliged to give security in the first ejectment, because his residence was then unknown.(g) The practice of granting these [ \*319 ] rules originated in the Court of King's Bench, and were, indeed, at first, entirely confined to cases of infant lessors.(h)

The proper time to take out a summons, or move the Court for this rule, is after plea pleaded.(i)

(a) *Noke v. Windham*, Strang. 694.—  
*Throgmorton, d. Miller, v. Smith*, Stran. 982.  
*Anon.* 1 Wils. 130. *Anon.* 1 Cowp. 123.—  
 Appendix, No. 43.

(b) B. N. P. 111. Appendix, No. 44.

(c) *Denn, d. Lucas, v. Fulford*, Barr. 1177.

(d) *Thrustout, d. Turner, v. Grey*, Stran.  
 1056. *Ante*, 246

(e) *Tidd's Prac.* 476, 7.

(f) *Goodright, d. Jones, v. Thrustout*,  
*Cas. Fr. C. P.* 15.

(g) *Doe, d. Selby, v. Alston*, 1 T. R. 491.

(h) *Thrustout, d. Dunham, v. Percival*,  
*Barn.* 183.

(i) 2 Sell. *Prac.* 189.

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[1] In Ejectment, where some of the lessors of the plaintiff reside out of the state, and others in it, the Court will not stay proceedings until security for costs is given. *Anonymous*, 2 *Penn. Rep.* 886.

The next case in which the courts interfere to stay the proceedings, is when the costs of a prior ejectment upon the same title, or between the same parties, are left unpaid. (j)

For some time after the introduction of this practice, the Court would not interfere unless the two ejectments were brought in the same Court; (k) but this limitation no longer prevails, and it is now immaterial in what court the first ejectment is brought. (l) Formerly, also, there was a diversity of opinion, whether the proceedings could be staid where the two ejectments were brought (without fraud, or collusion,) upon different demises, although upon the same title; (m) but it is now of no consequence whether the two ejectments are brought, upon the demise of the same or different persons, against all or some of the same parties, or for the same or different premises, provided they are brought upon the same title, and for the recovery of part of the same estate. [1] Thus,

(j) Append. No. 45.

(k) *Austine v. Hood*, 1 Sid. 279. *Tredway v. Harbert*, Comb. 106.

(l) *Doe, d. Hamilton, v. Atherly*, 7 Mod. 420. *Anon.* 1 Salk. 255. *Holdfast, d. Hat-*

*teraley, v. Jackson*, Barn 133. *Doe, d. Chadwick, v. Law*, W. Blk. 1163. *Doe, d. Walker, v. Stephenson*, 3 B. & P. 22.

(m) *Short v. King*, Stran. 651. *Tredway v. Harbert*, Comb. 106.

[1] Proceedings in Ejectment were stayed until costs of a former Ejectment between the same parties should be paid. *Bull's Lessee vs. Sherdine*, 1 Harr. & Johns. Rep. 206.

The Court will not stay proceedings in Ejectment, till the costs of a former Ejectment are paid, unless it appear that the same title was or might have been tried in the former suit. *Jackson ex dem. Gouverneur & Al., vs. Stiles*, 2 Cowen's Rep. 596.

And where *W.* brought an Ejectment against *T.*, and *G.* sought to be admitted to defend as landlady of *T.*, which was denied, because *T.* was the tenant of *W.*; On *G.*'s bringing Ejectment against *T.*, Held, that the proceedings should not be stayed in the second Ejectment, till *G.* had paid the costs of the first. *Ibid.*

Where the tenant of the lessors in an action of Ejectment, defended a former Ejectment brought against him, but failed, and had judgment against him for costs, and was turned out of possession upon an *Habere Facias Possessionem*, and the same lessors afterwards brought an Ejectment against the lessor of the plaintiff in the first suit, for the same premises and upon the same title; the Court ordered the proceedings in the second action to stay, until the costs of the first were paid. *Jackson ex dem. Livingston vs. Edwards*, 1 Cowen's Rep. 138.

And this will be done, although one of the lessors in the second action had not demised to the defendant in the first. *Ibid.*

Thus, where *E.* brought Ejectment against *B.*, who held as tenant of others, upon which *E.* had judgment, and turned *B.* out of possession: in

proceedings have been staid where one of the lessors of the plaintiff in the first action died before the commencement of the second; [ \*320 ] where in \*the second ejectment two trustees were added to the lessors; where part of the lands were occupied by new tenants; where the second action was between the heir of the plaintiff's lessor, and the heir of the defendant in the first action. (m) And in a

(m) *Doe, d. Hamilton, v. Hatherly*, Stran. 6 T. R. 223. *Keene, d. Angel, v. Angel*, 6 T. R. 1152. *Thrustout, d. Williams, v. Holdfast*, R. 740. *Doe, d. Feldon, v. Roe*, 8 T. R. 645.

Ejectment by C. and those others, for the same premises, against E., proceedings were ordered to stay, till E.'s costs of the first suit should be paid. *Jackson ex dem. Livingston vs. Edwards*, 1 Cowen's Rep. 138.

Where A. and B. bring Ejectment and have judgment against them for costs, though C. afterwards bring Ejectment for a portion of the same premises upon the same title; yet the Court will not stay proceedings in the second suit till the costs of the first be paid. *Jackson ex dem. Clark vs. Clark*, 1 Cowen's Rep. 140.

The Court will not compel the defendant in Ejectment to proceed to trial, until the costs of a former suit in which the plaintiff had been non-processed, are paid. *Hurst's Lessee vs. Jones*, 4 Dall. Rep. 353.

Where a rule has been obtained for staying the proceedings in Ejectment till the costs of the former Ejectment have been paid, the Court will not interfere, and permit the defendant, in case those costs are not paid before a certain day, to be named by the Court, to *Non Pros*, the Ejectment pending. *Doe ex dem. Sutton vs. Ridgway*, 5 Barnew. & Ald. Rep. 523.

*Semble*, That the Court will not stay the proceedings in an Ejectment until the costs of a former Ejectment are paid, if it appear that the verdict was obtained by fraud and perjury. *Doe ex dem. Rees vs. Thomas*, 2 Barnew. & Cress. Rep. 622.

In the case of *Chatfield & Wife*, demandants, vs. *Souters*, tenant. 3 Bingham Rep. 167. *Wilde*, Serjt. had obtained a rule calling on the demandants to shew cause why all further proceedings on a Writ of Right should not be stayed until the tenant's costs of an Ejectment brought for the said premises were satisfied, in which Ejectment the lessors of the plaintiff, after entering the cause for trial in 1816, withdrew the record.

*Pell*, Serjt., who was to have shewn cause, was stopped by the Court, who called on

*Wilde*, to support his rule. [GABLEE, J. referred to the note in 3 Boscawen & Fuller, 23.]

*BEAR*, C. J. "The abandonment of the Ejectment was no decision on the merits, and the Court has no power to stay the proceedings in a Writ of Right, till the costs of a prior Ejectment are paid; it is a totally different proceeding: The rule often operates with hardship in Ejectment, and it would be more liable to do so in a Writ of Right, by preventing a party who was poor from asserting his title."

The rest of the Court concurring, the rule was Discharged.

case, where the second ejectment was brought by the lessee of an insolvent debtor, who had been the lessor of the plaintiff in the first action, and it appeared that the assignment was fraudulent to evade the payment of the costs, the Court (without entering into the point whether, in a fair case, the assignee of an insolvent debtor shall be called upon for former costs, before he be suffered to bring a new ejectment on the title of his principal,) made the rule absolute to stay the proceedings until the costs of the first action were paid.(n)

A distinction was also formerly taken as to the situation of the parties in the different actions, and it was holden, that if the defendant in the second ejectment had been the plaintiff's lessor in the first, the proceedings should not be staid : (o) but this doctrine is now also exploded, and the change of situation in the parties is immaterial.(p) The rule will also be granted, whether the merits be decided in the former action, or whether a judgment of non-suit, or of *nonpross*, be given; nor is the length of time which elapses between the two actions any bar to the rule; for many good reasons may exist for such delay, as the poverty of the other party, or a wish to end the controversy.(q)

\*The Courts will likewise stay the proceedings in a second [ \*321 ] ejectment until the costs of a former one be paid, if the conduct of the party against whom the application is made, has been vexatious or oppressive, although he is not liable to the costs of the first action. Thus, where the lessor of the plaintiff in the second action was also the lessor in the first, and had refused, after the appearance of the defendant in such first action, to enter into the consent rule, whereby, although nonsuited for want of a replication, he was exempted from the costs of the defendant's appearance, the Court would not let him proceed in the second ejectment until he had satisfied the defendant for the expenses of such first appearance.(r) And, upon the same principle, where the first ejectment was on the demise of the husband and wife, but the husband alone entered into the consent rule, and judgment was given therein in the Common Pleas for the defendant, (which judgment was afterwards affirmed in the King's Bench and the House of Lords,) and after the death of the husband, the wife brought a second ejectment on her own

(n) *Doe, d. Chadwick, v. Law*, W. Blk. 1180.

(o) *Roberts v. Cook*, 4 Mod. 379.

(p) *Thrustout, d. Williams, v. Holdfast*, 6 T. R. 228.

(q) *Dence v. Doble*, Comb. 110. *Kene, d. Angel, v. Angel*, 6 T. R. 740. *Anon. Balk*, 255.

(r) *Smith, d. Ginger, v. Barnardiston*, W. Blk. 904.

demise; the Court would not suffer her to proceed until the costs of the first ejectment were paid, saying, "We are not going to compel the lessor to pay the costs, but only to prevent her being vexatious."<sup>(s)</sup>

It was once, indeed, holden, that the proceedings in a second ejectment ought not *in any case* to be staid for non-payment of the costs in the first action, if costs were not of right payable to the party applying; <sup>(t)</sup> and that it was *in all cases*, necessary to show, that [ \*322 ] the party against whom <sup>\*</sup>the application was made, had acted vexatiously, or oppressively, before the rule could be obtained. But these maxims have long given place to more just and liberal principles.<sup>(u)</sup>

In a late case the Court ordered the proceedings in a second ejectment to be staid until the costs of an action for mesne profits, (upon which the lessor in the second ejectment, who had been the defendant in the first, had brought a writ of error,) as well as the costs of the first ejectment were paid.<sup>(v)</sup> But the Court will not extend the rule to include the damages recovered in such action for mesne profits, however vexatious the proceedings of the party may have been.<sup>(w)</sup>

The Courts will not stay the proceedings in the second action, where the party against whom the application is made, is already in custody under an attachment for non-payment of the costs of the first action.<sup>(x)</sup>

There is no particular stage of the proceedings at which it is necessary to move the Court, or take out a summons for this rule. It will be granted even before the defendant has appeared: and it always should be moved for as early in the action as it conveniently can be. Where, however, satisfactory reasons were given to the Court, why the application was not made at an earlier stage of the suit, the Court ordered the proceedings to be stayed until the costs of a former ejectment were paid, after a notice of trial had been given, and the lessor of the [ \*323 ] plaintiff had been at the <sup>\*</sup>expense of bringing his witnesses to the place of trial.<sup>(y)</sup> The reasons assigned to the Court were, that the cause was so clear at the last trial, and the parties had

(s) *Doe, d. Williams v. Hatherly*, Stran. 1152.

(t) *Thrustout, d. Parker, v. Troublesome*, Stran. 1099. S. C. And. 297.

(u) *Short v. King*, Stran. 681.

(v) *Doe, d. Pinchard, v. Roe*, 4 East, 585.

(w) *Doe, d. Church, v. Barclay*, 15 East, 233.

(x) *Benn, d. Mortimer, v. Denn*, Barn. 150.

(y) *Doe, v. Law, W. Blk.* 1158.

delayed so long commencing their second action, (four years,) that the defendants did not think them in earnest until notice of trial was given, and that the defendant then proceeded to tax his costs, in order to ground the application, which otherwise he would not have done, the lessor of the plaintiff being insolvent.

The Courts will also stay proceedings in an ejectment when the lessor of the plaintiff has two actions depending, at the same time, for the same premises, in different courts; [1] and the proceedings in one action will then be staid until the other action is determined. (z) And in a case, where the claimant brought thirty-seven separate ejectments for thirty-seven different houses, all of which depended on the same title, the Court said it was a scandalous proceeding, staid the proceedings in thirty-six of them, and made a rule that they should abide the event of the thirty-seventh. (a)

When the party, against whom a verdict in ejectment has been obtained, brings a writ of error and pending that writ, commences a second ejectment, the Court will order the proceedings in the second action to be stayed until the writ of error is determined; and it seems, also, that if it do not appear to the Court, that the writ of error was brought with some other view than to keep off the payment of costs, proceedings will be stayed until the costs of the first action are \*paid, [ \*324 ] notwithstanding such costs are suspended by the writ of error. (b)

By the statute 7 Geo. II. c. 20. s. 1. it is enacted, "that when an ejectment is brought by a mortgagee, his heirs, &c. for the recovery of the possession of the mortgaged premises, and no suit is depending in any court of equity, for the foreclosing or redeeming of such mortgaged premises, if the person having a right to redeem, having been made the defendant in the action, shall at any time, pending the suit, pay to the mortgagee, or in case of his refusal, bring into court, all the principal

(z) *Thrustout, d. Parke, v. Troublesome*,  
And. 287 S. C. Stran. 1099.

(a) 2 Sell. Prac. 144. *Ante*, 236.

(b) *Fenwick v. Grosvener*, 1 Salk. 268.—  
*Grumble v. Bodily*, Stran. 554.

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[1] The Court will not stay the proceedings in an Ejectment, until the taxed costs of a suit in equity, brought by the same party for the recovery of the same premises, are paid. *Doe ex dem. Williams vs. Winch & Al.*, 3 Barnew. & Ald. Rep. 602.



moneys, and interest due on the mortgage, and also costs to be computed by the Court, or proper officer appointed for that purpose; the same shall be deemed and taken to be a full satisfaction and discharge of the mortgage, and the Court shall discharge the mortgagor of and from the same accordingly." By the third section, the act is not to extend to any case where the person, against whom the redemption is prayed, shall insist, either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other sums than what appear on the face of the mortgage, or are admitted by the other side, nor to any case where the right of redemption in any cause, or suit, shall be controverted or questioned, by or between different defendants in the same cause, or suit.

An application for a rule to stay proceedings under this statute, (c) must of course be made before execution executed, and must be accompanied by an affidavit that no suit in equity is depending. The party should also appear to the action before the application is [ \*385 ] made, for the Courts \*have no power to interfere under the statute until after appearance. But where the premises were in possession of a tenant of the mortgagor, who neglected to appear to the action, in consequence of which the mortgagee recovered possession of the premises under a judgment by default against the casual ejector, the Court of Common Pleas (if the other party had not consented to take what was due upon the mortgage, and restore the possession) would have set the judgment and execution aside, in order to let the mortgagor in as defendant, and place him in a condition to apply to the Court to stay the proceedings on the terms of the statute. (d)

In a case in the Court of King's Bench, where a mortgagee made a will, leaving all his property to executors upon certain trusts, and died, and his will was disputed by his heir in the Prerogative Court, but by the sentence of that Court established, and letters testamentary in consequence granted to the executors; after which grant the heir appealed to the Court of Delegates against the sentence of the Prerogative Court, pending which appeal the executors assigned the mortgage to the lessor of the plaintiff, who also, pending the appeal, brought an ejectment against the mortgagor for the recovery of the mortgaged premises, to which ejectment the mortgagor did not appear, but suffered judgment to go by default against the casual ejector. Upon an application on the

(c) Append. No. 46.

(d) *Doe, d. Tubb, v. Roe*, 4 Taunt. 887.

part of the mortgagor (accompanied by an affidavit of the facts) to stay the execution until the determination of the appeal, upon the ground, that the title of the lessor would be invalidated, provided the appeal were given in favour of the heir, and that the defendant might then perhaps be compelled to pay the mortgage \*money twice, the [ \*326 ] Court made the following order: "That the execution obtained by the lessor of the plaintiff, in this action of ejectment, be stayed until such time as the appeal, now pending before the Court of Delegates, be determined, upon the defendant vesting the mortgage money, interest, and costs, to be taxed by the Master, in Exchequer bills, and depositing such Exchequer bills in the hands of the signer of the writs in this court.(e)

A rule upon this statute has been granted after an agreement, on the part of the mortgagor, to convey the equity of redemption to the mortgagee, where no tender of a deed of conveyance for execution had been made to the defendant, or bill in equity filed;(f) but where it appeared that, subsequently to the defendant's agreement, several applications had been made to him, but without effect, to complete the purchase the Court refused to stay the proceedings.(g)

In a case where, upon an application by the mortgagor to stay proceedings under this statute, it appeared that he had also taken up money from the mortgagee upon his bond, the Court granted the rule upon the payment of the mortgage and interest only, the bond debt not being a lien upon the lands; but it seems, that when in such case the heir is bound by the bond and the mortgagor dies, the heir must discharge the bond debt, as well as the mortgage.(h) Where, however, the bond was a lien on the estate, and the mortgagee had given notice to the mortgagor, that he should insist upon payment of the money [ \*327 ] due upon it, the Court refused to stay the proceedings upon payment of the mortgage money only.(i) Where also other mortgages, although upon different premises, existed between the defendant and the plaintiff's lessor, the Court would not stay proceedings under this sta-

(e) *Doe, d. Mayhew, v. Erlam*, MS. M. T. 1811. The Court did not in this case advert to the circumstance that the mortgagor, who made the application, had not appeared to the action.

(f) *Skinner v. Stacey*, 1 Wils. 80.

(g) *Goodtitle, d. Tysrum, v. Pope*, 7. T. R. 186.

(h) *Bingham, d. Lane, v. Gregg*, Barn. 182. *Archer, d. Hankey, v. Snapp*, And. 841. S. C. Stran. 1107, and the cases there cited.

(i) *Felton v. Ash*, Barn 177. It is not stated in the report of the case, from what circumstance the bond became a lien on the estate.

tute, upon the payment of the sum due upon one of the mortgages only.(j)

If, upon a motion of this nature, any doubt exists as to the amount of what is due between the parties, the Court of King's Bench will refer the case to the master, and the Court of Common Pleas to the prothonotary, whose respective duty it is to tax the costs; and in a case where an affidavit was made, that the mortgagee had been at great expense in necessary repairs of part of the premises in his possession, (the ejectment being brought for the residue,) and it was prayed, that the prothonotary might be directed to make allowance for such repairs; the Court said, that the rule must follow the words of the statute, and that the prothonotary would make just allowances and deductions.(k) If, however, after taxation, the debt and costs are not paid, the lessor must proceed in the suit, and cannot have an attachment.(l)

The cases in which the Courts have stayed the proceedings under stat. 4 Geo. II. c. 28. have already been considered.(m)

(j) *Roe, d. Kaye, v. Soley*, W. Blk. 728. It does not appear from the report of this case, that the other mortgaged premises were included in the ejectment; but it is difficult to reconcile the decision either to the letter

or spirit of the statute, unless they were also contained in the declaration.

(k) *Goodright v. Moore*, Barn. 176.

(l) *Hand v. Dinely*, Stran 1220.

(m) *Ante*, 156, &c. Append. No. 47.

## CHAPTER XIII.

## OF THE ACTION FOR MESNE PROFITS.[1]

WHILST the action of ejectment remained in its original state, and the ancient practice prevailed, the measure of the damages given by the jury, when the plaintiff recovered his term, were the profits of the land accruing during the *tortious* holding of the defendant. But upon the introduction of the modern system, an alteration took place in this particular; and as the proceedings are now altogether fictitious, the damages assessed are only nominal, and do not include the real injury sustained by the claimant from the loss of his possession.[2] When, therefore, this alteration took place, it became necessary to give another remedy to the lessor for these damages; and this was effected by a

[1] A recovery of nominal damages in Ejectment is no bar to an action for the *mesne profits*. *Van Alen vs. Rogers*, 1 *Johns. Cas.* 281.

And it is unnecessary to enter a *Remittitur Damna*. *Ibid*.

A recovery in an action of trespass on land, is a bar to an action for the recovery of *mesne profits* anterior to the verdict in trespass. *Coleman vs. Parish*. 1 *M' Cord's Rep.* 264.

Where the title of the lessor, being a *Life Estate*, ends before the trial of the cause, the plaintiff, though he cannot turn the defendant out of possession, is entitled to judgment, so as to enable him to recover the *mesne profits*, but with a perpetual stay of the writ of possession. *Jackson ex dem. Henderson vs. Davenport*, 18 *Johns. Rep.* 295.

After the re-entry of the *Disseisee*, the law supposes the freehold all along to have continued in him; and he may maintain trespass against the *Disseisor* and his servants. *Dewey vs. Osborn*, 4 *Cowen's Rep.* 329.

[2] After judgment for the plaintiff in Ejectment, trespass for the *mesne profits*, without proof of an actual trespass, does not lie against a person, who was no party to the suit, when the judgment was entered. *Alexander vs. Herbert*, 2 *Call's Rep.* 508.

new application of the common action of trespass *vi et armis*, generally termed an *action for mesne profits* : (n) [3] in which action, the plaintiff complains of his ejection and loss of possession, states the time during which the defendant (the real tenant) held the lands and took the rents and profits, and prays judgment for the damages which he has thereby sustained.

[ \*329 ] It has been said, that a lessor in ejectment may, if he \*please waive the trespass, and recover the mesne profits in an action for use and occupation ; (o) but this election must be limited to the profits accruing antecedently to the time of the demise in the ejectment ; for the action for use and occupation is founded on *contract*, the action of ejectment upon *wrong*, and they are, therefore, wholly inconsistent with each other when applied to the same period of time ; since in the one action the plaintiff treats the defendant as a *tenant*, and in the other as a *trespasser*. (p) When, however, a tenant holds over after the expiration of the landlord's notice to quit, the landlord, after a recovery in ejectment, may waive his action for mesne profits, and maintain debt upon the 4 Geo. II. c. 28. against the tenant for double the yearly value of the premises during the time the tenant so holds over : for the double value is given by way of penalty and not as rent. (q)

The action for mesne profits may be brought pending a writ of error in ejectment, and the plaintiff may proceed to ascertain his damages,

(n) *Reev. E. L.* 4 vol. 169.

(o) *Goodtitle v. North*, Dougl. 584. *Doe, d. Cheney, v. Batton*, Cowp. 243.

(p) *Birch v. Wright*, 1 T. R. 378.

(q) *Timnings v. Roulison*, Burr. 1603. It is not yet settled whether, when the eject-

ment is founded upon a notice to quit given by the tenant, the landlord is entitled to maintain debt upon the 11 Geo. II. c. 19. for double rent, but it seems the better opinion that he is not. *Ante*, 143.

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[3] An action of trespass is a proper mode of recovering *mesne profits* after a recovery in Ejectment under the acts of 21st March, 1806, and 13th April, 1807, [*Pennsylvania*.] *Osbourn vs. Osbourn*, 11 *Serg. & R. Rep.* 55.

There is nothing in the action of Ejectment by writ under these Acts of Assembly, which varies the consequences of a recovery from those of the Common Law, except where expressly declared by the Legislature. *Ibid.*

*It seems*, that if the plaintiff do not seek to recover damages for a time anterior to the service of the writ of Ejectment, the recovery in Ejectment is conclusive, and estops the defendant ; but if he do, he must show his title, and the possession of the defendant. *Ibid.*

and to sign his judgment ;[1] but the Court will stay execution until the writ of error is determined.(r)

The action is bailable or not, at the discretion of the Court, or judge, and when an order for bail is made, the recognizance is usually taken in two years value of the premises, but this is also discretionary.(s)

\*The lessor of the plaintiff in the antecedent action of ejectment, is of course the person concerned in interest, but he may bring his action for mesne profits either in his own name, or that of his nominal lessee.(t) The former, however, is the more advantageous method ; as he may then, upon proper proofs, recover damages for the rents and profits received by the defendant, anterior to the time of the demise in the ejectment,[1] which cannot be done in an action at the suit of the nominal plaintiff,(u) and the Courts will not stay the proceedings until security be given for the costs, which will be done when the action for mesne profits is brought in the name of such nominal lessee.(v)[2]

(r) *Harris v. Allen*, Cas. Prac. C. P. 46.  
*Donford v. Ellis*, 12 Mod. 188.

(s) *Hunt v. Hudson*, Barn 85. 1 Sell. Prac. 36.

(t) It may here be incidentally observed, that when the ancient practice is resorted to, and the plaintiff in the ejectment is a real

person, the Court will not permit him to release the action for mesne profits, should the lessor bring it in his name. (*Close's case*, Skin. 247 Anon. Salk. 260.)

(u) B N. P. 87.

(v) Say. Costs. 126.

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[1] It is not necessary to enter up a formal judgment in Ejectment, to entitle the plaintiff to bring trespass for the *Mesne Profits*. *Murphy vs. Guion's Ex'rs*. 1 *Nor. Car. Law Repos.* 95.

Where a defendant in Ejectment, who has been evicted by *Habere Facias Possessionem*, is afterwards restored to possession by writ of restitution, he is liable to an action of *Mesne Profits*, from the original eviction, if the writ of restitution is quashed. *Trabue & Al. vs. Kellar*, 3 *Marsh. Rep. (Ky.)* 518.

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[1] The general rule in trespass for *mesne profits* is, that the plaintiff shall recover for such time as he can prove the defendant to have been in possession, provided he does not go back beyond six years, in which case the Statute of Limitations may be pleaded. *Hare vs. Furey*, 3 *Yeates' Rep.* 13.

In trespass for *Mesne Profits*. after recovery in Ejectment, the plaintiff cannot give evidence of the annual value of the premises beyond the time of the lease, mentioned in the declaration in Ejectment. *Shotwell vs. Boehm*, 1 *Dall. Rep.* 172.

[2] Where the action for *Mesne Profits* is brought in the name of the

It was once, indeed, doubted whether this action could be maintained in the name of the plaintiff in the ejectment, after a judgment by default against the casual ejector, because, being a possessory action, an entry must be either proved or admitted, neither of which, it was argued, could in such case be done; but it is now settled, that there is no distinction between a judgment in ejectment upon a verdict and one by default,[3] the right of the claimant being in the one case tried and determined, and in the other confessed.<sup>(w)</sup>

A tenant in common, who has recovered in ejectment, may maintain an action for mesne profits against his companion.<sup>(x)</sup>[4]

[ \*331 ] \*As the action for mesne profits is an action of trespass, it cannot be maintained against executors or administrators, for the profits accruing during the lifetime of the testator or intestate; nor will a court of equity interfere to enforce the payment of them against personal representatives, when the lessor has been deprived of his legal remedy by the mere accident of the defendant's death. But, where the lessor was delayed from recovering in ejectment by a rule of the

<sup>(w)</sup> *Aslin v. Packer*, Barr. 665. *Jeffries v. Dyson*, Stran. 960.

<sup>(x)</sup> *Goodtitle v. Tombs*, 3 Wils. 118. *Cuttig v. Derby*, W. Black. 1077.

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nominal plaintiff in Ejectment, the Court will stay proceedings on his part till security for costs be filed. *Jackson vs. Par*, 4 *Cowen's Rep.* 147.

[3] In trespass for *Mesne Profits*, consequent on an Ejectment, and judgment by default against the casual ejector, the defendant can set up no matter of defence admissible in the original action; *e. g.* that he was not in possession of the premises in question. *Jackson vs. Combs*, 7 *Cowen's Rep.* 36. SAME POINT, *Baron vs. Abeel*, 3 *Johns. Rep.* 481. *Langendyck & Uz. vs. Burhans*, 11 *Johns. Rep.* 463.

After a recovery in Ejectment by default, against the casual ejector, the lessor of the plaintiff may maintain trespass for the *Mesne Profits* against the tenant, as well for the use of the land as for the costs of the Ejectment. *Baron vs. Abeel*, 3 *Johns. Rep.* 481.

In an action for *Mesne Profits*, the confession of entry by the defendant in the Ejectment, is sufficient to enable the plaintiff to recover; *Aliter*, when the judgment in Ejectment was recovered by default. *Lessee of Brown vs. Galloway*, 1 *Peters' Circ. Ct. Rep.* 291.

[4] In the case of one joint tenant, or tenant in common, recovering against his partner, it is incumbent on the plaintiff to obtain possession in a reasonable time after judgment in Ejectment, and if he be remiss herein for years, he shall not charge the defendant as a trespasser. *Hare vs. Furey*, 3 *Yeater' Rep.* 13.

court of law, and by an injunction at the instance of the defendant, who ultimately failed both at law and in equity, the Court decreed an account of the mesne profits against his (the defendant's) executors.(y)

It is also doubtful, whether the action can be maintained against a tenant for the holding over of his undertenants, for it should be brought against the person in actual possession and trespassing.(z) But any person so found in possession after a recovery in ejectment, is liable to the action :[1] and it is no defence to say that he was upon the premises as the agent, and under the license of the defendant in ejectment, for no man can license another to do an illegal act. But the measure of

(y) *Pulteney v. Warren*, 6 Ves. J. 73.

(z) *Burne v. Richardson*, 4 Taunt. 720.

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[1] Where, during the pendency of an action of Ejectment, the defendant gives up the possession to a third person and afterwards the plaintiff recovers judgment, such third person is liable for the *Mesne Profits*; the recovery in Ejectment is conclusive evidence against him, and he cannot set up a title in himself as a bar. *Jackson vs. Stone*, 13 Johns. Rep. 447.

And, it seems, a verdict in Ejectment is evidence in an action for *Mesne Profits*, against any one in possession of the premises. *Jackson ex dem. Church vs. Hills*, 8 Cowen's. Rep. 290.

If the tenant have made improvements on the land, under a contract with the owner, he will not be allowed for them in this action, when brought by a devisee, but must seek his compensation from the personal representatives of the devisor. *Van Alen vs. Rogers*, 1 Johns. Cas. 281.

It lies against a person who has entered under a contract for a deed, and afterwards refuses to perform the contract. *Smith vs. Stewart*, 6 Johns. Rep. 46.

In relation to third persons the judgment in Ejectment is not conclusive; and if they be sued in an action for *Mesne Profits*, they may controvert the plaintiff's title at large. *Chirac & Al. vs. Reinicker*, 11 Wheat. Rep. 280.

In such suit the record of the Ejectment is not evidence to establish the plaintiff's title, but it is admissible in connexion with an executed writ of possession, to show the fact of possession. *Ibid.*

The action for *Mesne Profits* may be maintained against the landlord in fact, who has been in possession of the land by means of his tenants, and who, by his acts, commands, or co-operation, aids in the expulsion of the plaintiff, and in withholding possession from him. *Ibid.*

The plaintiffs in such case are not estopped by the consent rule, in the action of Ejectment, by which another person was admitted to defend the landlord. *Ibid.*

Notice of an Ejectment suit, or defence of the suit, by a person, not tenant in possession, or defendant on record, does not make him party to the suit in contemplation of law, so as to conclude his rights. *Chirac & Al. vs. Reinicker*, 11 Wheat. Rep. 280.



the damages in such case will not be the whole mesne profits of the lands, but will depend upon the time such person has had them in his occupation, together with the other circumstances of the case.(a)

In the case of *Keech, d. Warne, v. Hall*,(b) where it was decided that a mortgagee might recover in ejectment, without a previous [ \*332 ] notice to quit, against a tenant claiming \*under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee, it was asked by the counsel for the defendant, if such mortgagee might also maintain an action against the tenant for mesne profits, which would be a manifest hardship and injustice to the tenant, as he would then pay the rent twice. Lord Mansfield, C. J. gave no opinion on that point; but said, there might be a distinction, for the mortgagor might be considered as receiving the rent in order to pay the interest, by an implied authority from the mortgagee until he determined his will.(c)

The declaration in the action for mesne profits must expressly state the different parcels of land from which the profits arose, or the defendant may plead the common bar. It should also state the time when the defendant broke and entered the premises and ejected the plaintiff, the length of time during which he so ejected him, and the value of the mesne profits of which he deprived him; and a declaration which does not contain these statements will be holden ill on special demurrer: but the defect is cured by verdict, or after judgment by default and writ of inquiry executed, by the operation of the stat. 4 Ann. c. 16.(d)

In the statement of the damages in the declaration the costs of the ejectment may be included, whether the judgment be against the casual ejector, or against the tenant or landlord; and when the judgment is against the casual ejector for want of an appearance, the costs are invariably included in the statement of the damages, though it ap- [ \*333 ] \*pears more prudent for reasons already assigned in other cases, to omit them.(e)

The general issue is *not guilty*, [1] and if the plaintiff declare against

(a) *Girdlestone v. Porter*, K. B. M. T. 39.  
Geo. III. Wood. L. and T. 511

(b) *Doug.* 21.

(c) *Et vide* 4 Ann. c. 16. s. 10.

(d) *Higgins v. Highfield*, 12 East. 407.

(e) *Gulliver v. Drinkwater*, 2 T. R. 261.

*Doe v. Davies*, 1 Esp. 356, *et vide* *Uttersen v. Vernon*, 3 T. R. 589 47. *Ante*, 303

[1] An action for *Mesne Profits* is an equitable action, and will allow of

the defendant, for having taken the mesne profits for a longer period than six years before action brought, the defendant may plead the statute of limitations, namely, *not guilty within six years* before the commencement of the suit, and thereby protect himself from all but six years. (f) Bankruptcy is no plea in bar to this action, for the plaintiff does not demand the value of the land only, but the whole damages sustained by the tort; and as the damages are uncertain, they cannot be proved under a commission of bankruptcy, but must be ascertained by a jury under all the circumstances of the case. (g) The stat. of 49 Geo. III. c. 121. s. 9. which directs, that all persons *who shall have given credit* upon good and valuable consideration *bona fide*, for any money whatsoever, which is not due at the time of the bankruptcy, shall be admitted to prove such debts, &c. has been holden not to extend to damages recoverable in an action for mesne profits. (h)

As, also, this action is for a *tortious* occupation, the defendant cannot pay money into Court. (i)

It was formerly holden, that if the action for mesne profits were brought in the name of the claimant in the ejectment, or after a judgment by default against the casual ejector, the defendant was

(f) B. N. P. 88.

(h) *Moggridge v. Davis*, 1 Whit. 16.](g) *Goodtitle v. North*, Doug. 584.(i) *Holdfast v. Morris* 2 Wils. 115.

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every kind of equitable defence. *Murray vs. Gouverneur*, (IN ERROR,) 2 Johns. Cas. 438.

A recovery in trespass for *Mesne Profits*, is only for the *Use and Occupation* of land, and does not bar an action of trespass *Quare Clausum Fregit*, for injuries done to the premises during the same period. *Gill vs. Cole*. 1 Harr. & Johns. Rep. 403.

If the plaintiff can prove that his title accrued before the time of the demise in the Ejectment, and that the defendant has been longer in possession, he may recover antecedent profits; but in such case the defendant is at liberty to controvert his title. *West vs. Hughes*, 1 Harr. & Johns. Rep. 574.

In trespass for the *Mesne Profits*, the defendant is not estopped by the judgment in Ejectment from showing that the plaintiff was in possession of the land, between the demise laid in the declaration and the judgment.—*Ibid*.

The defendant in Ejectment is not estopped from pleading *Liberum Tenementum* to trespass for the *Mesne Profits*, where the term was expired when the judgment in Ejectment was entered. *Murphy vs. Guion's Ex'r.*, 2 Hayw. Rep. 381.

at liberty to controvert the plaintiff's title; because the plaintiff in the action for mesne profits, in the one case, and the defendant in the other, were not parties to the record in the previous ejectment, and, therefore, no estoppel could arise either against, or in favor of either of them, by such record (j) But it is now settled, that after every recovery in ejectment, the tenant is estopped from controverting the title of the plaintiff in a subsequent action for mesne profits, provided the plaintiff proceed only for the profits accruing subsequently to the time of the ouster in the ejectment.[1] If, however,

(j) 1 Lill. Prae. Reg. 676. *Jeffries v. Dyson*, Stran. 960.

[1] The record of recovery in Ejectment, is conclusive evidence of title in the lessor of the plaintiff, from the time of the demise laid, against the defendant and his servants; who cannot, therefore, in bar of an action of trespass, shew title in another after that time. *Dewey vs. Osborn*, 4 Cowen's Rep. 329.

Where there are several separate demises in a declaration in Ejectment, an action of trespass against the defendant or his servants may be maintained in the name of that lessor upon whose title the recovery was had; and where it appeared that the sheriff delivered possession to one of the several lessors under the *Hab. Fac. Poss.*, this was held *Prima Facie* evidence that the recovery was upon his title. *Ibid.*

The plaintiff is entitled to the *Mesne Profits*, from the time of the demise laid in the declaration in Ejectment. *Van Alen vs. Rogers*, 1 Johns. Cas. 281.

The right to *Mesne Profits* is a necessary consequence of a recovery in Ejectment. *Benson & Al. vs. Matsdorf*, 2 Johns. Rep. 369.

The defendant cannot set up a title in bar, even if he have a better title. *Burton & Al. vs. Matsdorf*, 2 Johns. Rep. 369. SAME POINT, *Jackson vs. Randall*, 11 Johns. Rep. 405.

So, where the lessor had taken possession under the judgment in Ejectment, and brought his action for the *Mesne Profits*, and the defendant had, in the mean time, brought Ejectment for the same premises, and obtained a verdict; he cannot set up the verdict as a bar to the action for *Mesne Profits*. *Jackson vs. Randall*, 11 Johns. Rep. 405.

No defence can be set up in the action for *Mesne Profits*, which would have been a bar to the action of Ejectment. *Baron vs. Abeel*, 3 Johns. Rep. 481. SAME POINT, *Jackson vs. Randall*, 11 Johns. Rep. 405. *Langendyck vs. Burhans*, 11 Johns. Rep. 461.

After a recovery in Ejectment, the lessor of the plaintiff brought trespass for *Mesne Profits*, and pending the suit, conveyed the premises to the defendant, with all his right, title, interest, and claim in the same: *Held*, that the deed was not a release of the *Mesne Profits*, but that the plaintiff might nevertheless recover in the action. *Duffield vs. Stille*, 2 Dall. Rep. 156, S. C. 1 Yeates' Rep. 154.

he seek to recover profits antecedent to the demise therein, or bring his action against a precedent occupier, the record in the ejectment cannot be given in evidence, but the plaintiff must prove his title to the premises, from whence the profits arose, to entitle him to receive them. (k) [2]

He must, also, in such case, prove an entry upon the lands, though some doubt seems to exist as to what proof of entry will be sufficient. By some it has been said, that the plaintiff is entitled to recover the mesne profits only from the time he can prove himself to have been in possession, and that, therefore, if a man make his will and die, the devisee will not be entitled to the profits until he has made an actual entry, or in other words, until the day of the demise in the ejectment; for that none can have an action for mesne profits unless in case of actual entry and possession. Others have holden, that when once an entry has been made, it will have relation to the time the title accrued, so as to entitle the claimant to recover the mesne profits from that time; and they say that if the law were not so, the Courts would never have suffered plaintiffs in ejectments to lay their demises back in the manner they now do, and by that means entitle themselves to recover [ \*335 ] profits, to which they would not otherwise be entitled. (l) The latter seems the better opinion; but these antecedent profits are now seldom the object of litigation, from the practice of laying the demise and ouster immediately after the time when the lessor's title accrues. (m) It should, however, be observed, that when a fine with proclamations has been levied, an entry to avoid it will not, in this action, entitle the plaintiff to the profits between the time of the fine levied, and the time

(k) Bull. N. P. 87. *Aislin v. Parkin*, Barr. 665. S. C. Barn. 472.

(l) *Metcalf v. Harvey*, 1 Ven. 248, 3.—B. N. P. 87.

(m) *Ante*, 138.

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In general, a recovery in Ejectment, like other judgments, binds only parties and privies. *Chirac & Al. vs. Reinicker*, 11 Wheat. 280.

But such judgment is conclusive evidence, in an action of *Mesne Profits*, against the tenant in possession, when he has been duly served with a notice in Ejectment, whether he appears and takes upon himself the defence or suffers judgment to go by default against the casual ejector. *Ibid.*

[2] If the plaintiff claims damages for the occupation prior to the demise in the declaration in Ejectment, the defendant may dispute the title prior to that time. *Jackson vs. Randall*, 11 Johns. Rep. 405

In trespass for *Mesne Profits*, an innocent possessor may set off improvements. *Maris vs. Simple*. *Addis. Rep.* 215.

of the entry although they probably may be recovered in a Court of Equity.(n)

It has already been observed, that the defendant in this action is estopped from controverting the title of the plaintiff from the [ \*336 ] day of the demise in the ejectment ;[1] when, \*therefore the plaintiff seeks to recover only such profits as have accrued subsequently to such demise, no other evidence of his title is required, than examined copies of the judgment in ejectment, of the writ of possession and of the sheriff's return thereon ;(o) and if the plaintiff have been let into the possession of the premises by the defendant, an examined copy of the judgment in ejectment only will be sufficient. (p)[1] It has, indeed, been doubted, whether evidence of the writ of possession and sheriff's return is ever necessary, except upon judgment by default against the casual ejector, but it is, notwithstanding, prudent to be prepared with it in all cases, unless the plaintiff has been let into possession by the defendant.(q)[2]

(n) *Dormer v. Fortescue*, 3 Atk. 124.—  
*Comper v. Hicks*, 7 T. R. 727

(o) *Astin v. Parkin*, B. N. P. 87.

(p) *Calvert v. Horsfall*, 4 Esp. 67.

(q) *Vide Thorp v. Fry*, B. N. P. 87, et S. N. P. 688. (a. 50.) et *Astin v. Parkin*, Burr. 685. The reason assigned for this distinction is, that where the judgment is had against the tenant in possession, the defendant by entering into the consent rule, is estopped both as to the lessor and lessee, so that either may maintain trespass without an actual entry, but

that where the judgment is had against the casual ejector, no rule having been entered into, the lessor shall not maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed. But this reasoning is not satisfactory; for if the tenant be concluded by the judgment in the ejectment from controverting the plaintiff's title, it should seem he is also concluded from controverting his possession, for possession is part of his title.

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[1] *Vide Hopkins vs. McClaren*, (IN ERROR,) 4 *Cowen's Rep.* 667. & *Vide ANTE*, Page 334, n. [1].

[1] Where the judgment in Ejectment is against the tenant, who comes in and defends, the judgment is sufficient evidence in the action for *Mesne Profits*, without any writ of possession executed. *Jackson vs. Combs*, 7 *Cowen's Rep.* 36.

In an action for *Mesne Profits*, it is sufficient for the plaintiff to produce the verdict and judgment, where there has been a confession of entry, without proving a title to the land or an entry under the judgment. But where the judgment in Ejectment was obtained by default, an entry must be proved. *Lessee of Brown vs. Galloway*, 1 *Peters' Rep.* (Circ. Ct.) 299.

[2] In an action for *Mesne Profits*, founded on a recovery by default against the casual ejector, it is, in general, necessary to shew a writ of possession executed. But not where the tenant voluntarily abandons the possession, and the plaintiff in Ejectment enters, *Jackson vs. Combs*, 7 *Cowen's Rep.* 36.

\*In addition to this evidence the plaintiff must prove the [ \*337 ] length of time that the defendant (or his tenant, if he be the landlord,) has been in possession, the value of the mesne profits, and likewise the costs of the ejectment if they be included in the declaration as damages. He must also prove, when the judgment in ejectment is against the casual ejector for want of an appearance, and the action for mesne profits is brought against the landlord, that the defendant was landlord when the ejectment was brought, (which may be done by showing him to have received the rents and profits accruing subsequently to the day of the demise,) and that he received due notice of the service of the declaration in ejectment upon the tenant in possession; but if the landlord have subsequently promised to pay the rent and the costs of the ejectment, this proof will be dispensed with.(r)

The plaintiff will also be entitled to give evidence of any injury done to the premises,[1] in consequence of the misconduct of the defendant, provided such fact be specially alleged in the declaration.

If there be a recovery in ejectment against the wife, the judgment will not be evidence against the husband and wife, in an action for mesne profits; for the wife's confession of a trespass committed by her, cannot be given in evidence to affect the husband, in an action in which he is liable for the damages and costs.(s)

As the action for mesne profits is an action of trespass *vi et armis*, the jury are not confined in their verdict to the mere *rent* of the premises, although the action is said to be \*brought to recover the *rents and profits* of the estate; but may give such extra damages as they may think the particular circumstances of the case may demand.(t)[1] When the judgment in the ejectment is against the cas-

(r) *Hunter v. Britts*, 3 Campb. 455. et MS.

(t) *Goodtitle v. Tombs*, 3 Wils. 113. 21.

(s) *Denn v. White*. 7 T. R. 112.

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[1] A lessor in an action of Ejectment may bring trespass *Quare, &c.*, against the defendant or his servants, for an injury done to the freehold intermediate the verdict and *Hab. Fac. Poss.* executed. *Dewey vs. Osborn*, 4 Cowen's Rep. 329.

[1] In an action of trespass for *Mesne Profits*, against a *Bona Fide* purchaser, he shall be allowed against the plaintiff, in mitigation of damages, the value of permanent improvements made in good faith, to the extent of the rents and profits claimed by the plaintiff. *Jackson vs. Loomis*, 4 Cowen's Rep. 168.

ual ejector for want of an appearance, the costs of the ejectment are generally included in the damages; and, indeed, the lessor of the plaintiff has no other remedy in that case for them. When also the ejectment is regularly defended, *the taxed costs* may, it seems, be recovered with the mesne profits as damages.<sup>(u)</sup> But this mode of recovering taxed costs is seldom resorted to; and where after a recovery in ejectment, and before an action for mesne profits, the defendant became bankrupt, and the lessor inserted the taxed costs of the ejectment as damages in his action for mesne profits, but the jury did not include them in their verdict in executing a writ of inquiry therein, the Court refused to set aside the inquisition; because the costs being a liquidated debt, the plaintiff might have proved them under the defendant's commission of bankruptcy, and as he had chosen to take the chance of recovering in an oblique way more than he could have recovered in a direct manner, and had failed, the Court did not think it necessary to assist him.<sup>(v)</sup>

If the plaintiff in an action for mesne profits recover less than forty shillings, and the judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages; and this is the case whether the action is brought in the name of the lessor of the plaintiff in the ejectment, or in that of his nominal lessee.<sup>(w)</sup>

If in an ejectment there be a verdict for the plaintiff, and the [ \*339 ] defendant bring a writ of error, and enter into a recognizance to pay costs in case of nonsuit, &c. pursuant to stat. 16 & 17 Car. II. c. 8. and he be nonsuited, &c. the defendant in error needs not bring a *scire facias* or debt on the recognizance, but he may sue out an *elegit*, or writ of inquiry, to recover the mesne profits since the first judgment in ejectment.<sup>(x)</sup>[1]

(u) *Doe v. Davis*, 1 Esp. 358.

(w) *Doe v. Davis*, 6 T. R. 583. S. C. 1

(v) *Gulliver v. Drinkwater*, 2 T. R. 261.

Esp. 358.

(x) *Short v. Heath*, 2 Crompt. Prac. 225.

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In an action for *Mesne Profits*, the defendant may set off the value of his improvements, but that value ought in the first instance to be deducted from the profits received before the date of the demise, and which the plaintiff is precluded from recovering. *Hylton vs. Brown*, 2 Wash. Circ. Ct. Rep. 165.

[1] Where the lessor of the plaintiff dies after judgment in Ejectment, the execution may issue in the name of the lessee, without the necessity of a *Scire Facias*. *Lessee of Penn. vs. Klyne & Al.*, 1 Peters' Circ. Ct. Rep. 446.

## APPENDIX.

### No. 1.

SIR,

I hereby give you notice to quit and deliver up, on the day of \_\_\_\_\_ next, the possession of the messuage or dwelling house, (or "rooms and apartments," or "farm lands and premises") with the appurtenances, which you now hold of me, situate in the parish of \_\_\_\_\_ in the county of \_\_\_\_\_

Notice to quit by the landlord, to a tenant from year to year.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_

Yours, &c.

A. B.

To Mr. C. D. (the tenant in possession :) or (if it be doubtful who is tenant) To Mr. C. D., or whom else it may concern.

### No. 2.

SIR,

I do hereby, as the agent for and on behalf of your landlord A. B., of \_\_\_\_\_ give you notice to quit and deliver up, on (&c.) (as in No. 1.) which you now hold of the said A. B., situate, (&c.)

The like by an agent for the landlord

Dated, (&c.) \_\_\_\_\_

Your's, &c. E. F.

Agent for the said A. B.

To Mr. C. D. (&c.)

### \*No. 3.

[ \*352 ]

SIR,

I hereby give you notice, &c. (as in No. 1. to the date) provided your tenancy originally commenced at that time of the year; or, otherwise, that you quit and deliver up the possession of the said messuage, (&c.) at the end of the year of your tenancy, which shall expire next after the end of half a year from the time of your being served with this notice.

The like by the landlord, where the commencement of the tenancy is doubtful.

Dated, (&c.) \_\_\_\_\_

Yours, &c.

To Mr. C. D. (&c.)

A. B.



## No. 4. }

The like,  
by a tenant  
from year to  
year, of his  
intention to  
quit.

SIR,

I hereby give you notice of my intention to quit, and that I shall on the \_\_\_\_\_ day of \_\_\_\_\_ next, quit and deliver up the possession of the messuage, (&c.) which I now hold of you, situate, (&c.)

Dated, (&amp;c.)

Your's &amp;c.

To Mr. A. B.

C. D.

## No. 5.

Letter of at-  
torney to  
enter and  
seal a lease  
on the pre-  
mises.

Know all men by these presents, that I, A. B., of \_\_\_\_\_ have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute and appoint, C. D., of \_\_\_\_\_ my true and lawful attorney, for me, and in my name, to enter into and take possession of a certain messuage, (&c.) late in the tenure and occupation of \_\_\_\_\_ situate, (&c.) but now untenanted; and after the said C. D. hath taken [ \*643 ] \*possession thereof; for me, and in my name, and as my act and deed, to sign, seal, and execute, a lease of the said premises with the appurtenances, unto F. E. of \_\_\_\_\_ to hold the same to him, the said E. F., his executors, administrators, and assigns, from the \_\_\_\_\_ of \_\_\_\_\_ last past, before the date hereof, for the term of \_\_\_\_\_ years, at the yearly rent of a pepper-corn, if lawfully demanded: subject to a proviso, for making void the same, on tendering the sum of six pence to the said E. F., his executors or administrators. In witness, (&c.)

Sealed and delivered, &amp;c.

## No. 6.

Affidavit of  
executing  
the same.

I, K. of \_\_\_\_\_ gentleman, maketh oath and saith, that he was present, and did see A. B. of \_\_\_\_\_ named in the letter of attorney hereunto annexed, duly sign, seal and deliver, the said letter of attorney.

Sworn, (&amp;c.)

I. K.

## No. 7.

Lease.

This indenture, made the \_\_\_\_\_ day of \_\_\_\_\_ (&c.) between A. B. of \_\_\_\_\_ of the one part, and E. F. of \_\_\_\_\_ of the other part, witnesseth, that the said A. B. for and in consideration of the sum of five shillings of lawful money of Great Britain, to him in hand paid by the said E. F. at, or before the sealing and delivery of these presents

the receipt whereof the said A. B. doth hereby acknowledge, hath demised, granted, and to farm let, unto the said E. F., his executors and administrators, all that \*messuage, (&c.) situate, [ \*344 ] &c. late in the tenure and occupation of but now untenanted; to have and to hold the same unto the said E. F., his executors and administrators, from the day of last past, before the date hereof, for, and during, and until the full end and term of years from thence next ensuing, and fully to be complete and ended: yielding and paying therefor yearly and every year, during the said term, unto the said A. B. or his assigns, the rent of one pepper-corn, if lawfully demanded at the feast of

Provided always, and these presents are on this condition, that if the said A. B. or his assigns shall, at any time or times hereafter, tender, or cause to be tendered unto the said E. F. his executors or administrators, the sum of six pence, that then and in such case, and from thenceforth, this present indenture, and every thing herein contained, shall cease, determine, and be absolutely void, any thing herein contained to the contrary thereof in any wise notwithstanding. In witness whereof, the parties here have interchangeably set their hand and seals, the day and year first above written.

Sealed and delivered, as the act and deed of the above named A. B. by C. D. of hy virtue of a letter of attorney to him for that purpose made, by the said A. B. bearing date, (&c.) being the first duly stamped in the presence of	}	A. B. E. F. I. K.
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## No. 8.

Take notice, that unless you appear in his Majesty's Court of King's Bench at Westminster, \*within the first four days [ \*345 ] (or, if in the country, within the first eight days) of next term, at the suit of the above named plaintiff, E. F., and plead to this declaration in ejectment, judgment will be thereon entered against you by default. Yours, &c.

To Mr. G. H.

I. K. plaintiff's attorney

## No. 9.

In the King's Bench.

Between { E. F. on the demise of A. B. plaintiff,  
and G. H. - - - - - defendant.

Affidavit to  
move for  
judgment in  
K. B.

I. K. of

gentleman, maketh oath and saith, that

on the                      day of                      last, he, this deponent, did see C. D. in the letter of attorney hereto annexed named, for, and in the name of A. B., the lessor of the plaintiff, enter upon, and take possession of the messuage in the lease hereto also annexed mentioned, by entering on the threshold of the outer door thereof; and putting his finger into the keyhole of the said door, the said messuage being then locked up and uninhabited, so that no other entry thereon could be made, nor any possession thereof taken, without force; and this deponent further saith, that he did, on the same day, see the above named C. D. after such entry made, and whilst he stood on the threshold of the said door, duly sign and seal the lease hereunto annexed, in the name of the said A. B. and as his act and deed deliver the same unto the said E. F. the plaintiff above named; and that after the said lease was so executed, this deponent did see the said E. F. take possession of the said messuage, by virtue [ \*346 ] of the said lease, by entering upon the threshold of the said outer door, and putting his finger into the key-hole of the said door, the said messuage being then locked up and uninhabited, so that no other entry could be made thereon, save as aforesaid; and that immediately afterwards, the said G. H. the defendant, came and removed the said E. F. from the said door, and put his foot on the threshold thereof; whereupon this deponent did, on the day and year aforesaid, deliver to the said defendant G. H., who still continued upon the said threshold, a true copy of the declaration of ejectment, and notice thereunder written, hereunto annexed.

Sworn, (&c.)

#### No. 10.

Original  
writ.

George the Third, (&c.) to the sheriff of                      greet-  
ing: If John Doe shall give you security of prosecuting his  
claim, then put by gages and safe pledges, Richard Roe, late of  
yeoman, that he be before us on  
wheresoever we shall then be in England, (or in C. P. "that he  
be before our justices at Westminster, on  
") to show wherefore, with force and arms, he en-  
tered into                      messuages, &c. with the appur-  
tenances, in                      which A. B. hath demised to the  
said John Doe, for a term which is not yet expired, and ejected  
him from his said farm; and other wrongs to the said John  
Doe, there did, to the great damage of the said John Doe, and

against our peace : And have you there the names of the pledges, and this writ. Witness ourself at Westminster, the  
 day of in the year  
 of our reign.

## \*No. 11.

[ \*347 ]

Pledges to prosecute } JOHN DEN,  
 } RICHARD FEN,  
 The within named Richard Roe is } JOHN SMITH,  
 attached by pledges. } WILLIAM STILES.

Sheriff's return thereto

## No. 12.

In the King's Bench, (or Common Pleas,)  
 term, in the year of the reign of King George  
 the Third, (to wit) Richard Roe, late of  
 yeoman, was attached to answer John Doe  
 of a plea, wherefore the said Richard Roe, with force and arms,  
 &c. entered into messuages, barns,  
 stables, outhouses, yards,  
 gardens, orchards. acres of arable land,  
 acres of meadow land, and acres of pasture  
 land, with the appurtenances, situate, &c. which A. B. had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm ; and other wrongs to the said John Doe there did, to the great damage of the said John Doe, and against the peace of our lord the now king, (&c.)  
 And thereupon the said John Doe, by his attorney, complains ; that whereas the said A. B. on, &c. at, &c. had demised the said tenements with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe, and his assigns, from the day of then  
 last past, for and during, and unto the full end and term of  
 years from thence \*next ensuing, and fully to be complete and ended : By virtue of which said demise, the said John Doe entered into the said tenements with the appurtenances, and became, and was thereof possessed, for the said term so to him thereof granted : And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on, &c. with force and arms, &c. entered into the said tenements with

Declaration  
 by original,  
 on a single  
 demise,  
 with notice  
 to appear  
 thereto.

[ \*348 ]



A. B. on, &c. at, &c. had demised the said tenements first above mentioned, with the appurtenances, to the \*said John Doe ; to have and to hold the same to the said John Doe, and his assigns, from the                      day of                      then last past, for and during, and unto the full end and term of years from thence next ensuing, and fully to be complete and ended.\* And, also, that whereas the said E. F. on, &c. at, &c. had demised the said tenements secondly above-mentioned with the appurtenances, to the \*said John Doe, to have and to hold [ \*351 ] the same to the said John Doe and his assigns, from the said                      day of                      then last past, for and during, and unto the full end and term of years from thence next ensuing, and fully to be complete and ended : By virtue of which said several demises, the said John Doe entered into the said several tenements first and secondly above mentioned with the appurtenances, and became, and was thereof possessed, for the said several terms, so to him thereof respectively granted : And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on, &c. with force and arms, (&c.) entered into the said several tenements first and secondly above mentioned with the appurtenances, which the said A. B. and E. F. had respectively demised to the said John Doe, in manner and for the several terms aforesaid, which are not yet expired, and ejected the said John Doe from his said several farms ; and other wrongs ; &c. (as in the preceding precedent with the like notice to appear.)

## No. 15.

(As in the last precedent to this mark.\*) By virtue of which said demise, the said John Doe entered into the said tenements <sup>The like, with two ousters.</sup> first above mentioned with the appurtenances, and became, and was thereof possessed, for the said term so to him thereof granted : And the said John Doe being so thereof possessed, the said Richard Roe afterwards, (to wit,) on, &c. with force and arms, &c. entered into the said tenements first above mentioned with the appurtenances, which the said \*A. B., had de [ \*351 ] mised to the said John Doe, in manner, and for the term aforesaid, which is not yet expired, and ejected him, the said John Doe, from his said farm : And, also, that whereas the said E. F.

on, &c. at, &c. had demised the said tenements secondly above mentioned, with the appurtenances, to the said John Doe; to have and to hold the same to the said John Doe and his assigns, from the said                      day of                      then last past, for and during, and unto the full end and term of                      years from thence next ensuing, and fully to be complete and ended: By virtue of which said last mentioned demise, the said John Doe entered into the said tenements secondly above mentioned with the appurtenances, and became, and was thereof possessed for the said last mentioned term so to him thereof granted: And the said John Doe being so thereof possessed, the said Richard Roe afterwards, to wit, on, &c. with force and arms, &c. entered into the said tenements secondly above mentioned with the appurtenances, which the said E. F. had demised to the said John Doe, in manner, and for the term last aforesaid, which is not yet expired, and ejected the said John Doe from his said last mentioned farm, and other wrongs, &c. (as in No. 14, with the like notice to appear.)

## No. 16.

Affidavit of  
service of  
declaration  
in eject-  
ment.

In King's Bench, (Common Pleas, or Exchequer Pleas.)

Between { John Doe on the demise of A. B. plaintiff, and  
                  { Richard Roe, - - - - - defendant,

I. K., of    gentleman, maketh oath, that he,

[ \*352 ]

this deponent, did, on, &c. \*person-\*ally serve C. D., tenant in possession of the premises in the declaration of ejectment hereunto annexed mentioned, or (if he be not tenant of the whole) some part thereof, with a true copy of the said declaration, and of the notice thereunder written, hereunto annexed, and this deponent, at the same time, read over the said notice to the said C. D., and explained to him the intent and meaning of such service,† (or generally thus: and this deponent, at the same time, acquainted the said C. D. of the intent and meaning of the said declaration and notice.)

Sworn, &c.

I. K.

## No. 17.

(As in the last precedent to this mark\*) personally serve C. D. The like, where there are several tenants. (&c.) tenants in possession, (&c.) (as in the last) with the said declaration, and the notice thereunder written, by delivering a true copy of the said declaration and notice to each of them the said C. D., &c. (and, if the notice was not directed to all the tenants, say "except that the said notice was directed to each of them the said C. D. &c. separately;") and this deponent, at the same time, read over the said notice to each of them the said C. D., (&c.) and explained to them respectively the intent and meaning of such service; (or generally, that "this deponent, at the same time, acquainted each of them the said C. D., &c. of the intent and meaning of the said declaration and notice.")

Sworn, &amp;c.

I. K.

## \*No. 18.

[ \*353 ]

(As in No. 16, to \*) personally serve C. D., tenant in possession of part of the premises in the declaration of ejectment hereunto annexed mentioned, with a true copy. &c. (as in No. 16, to †:) And this deponent further saith, that he did, on the same day, also serve G. H., tenant in possession of other part (or residue) of the premises in the the said declaration mentioned, with another true copy of the said declaration and notice thereunder written, by delivering the same to, and leaving it with M. H., the wife of the said G. H., at the dwelling house of the said G. H., being parcel of the premises in the said declaration mentioned, and this deponent, at the same time, read over the notice thereunder written to the said M. H., and explained to her the intent and meaning of such service.

(Sworn, &amp;c.)

I. K.

## No. 19.

In the King's Bench, (&amp;c.)

Between { John Doe on the demise of A. B., plaintiff,  
and Richard Roe, - - - defendant.

A. B. of                      lessor of the plaintiff in this case, and  
I. K. of                      gentleman, severally make oath and say; The like, on stat. 4 Cos. II. chap. 22. where the premises are untenanted.

and first, this deponent, I. K. for himself saith, that he did, on, &c. affix a copy of the declaration in, ejectment hereunto an-



nexed, and the notice thereunder written, upon the door of the messuage in the said declaration mentioned, (or, in case the ejectment is not for the recovery of a messuage, "upon

[ \*354 ]

being a notorious place of lands, tenements, or hereditaments, comprised in the said declaration in ejectment,") there being no tenant then in actual possession thereof. And this deponent, A. B., for himself saith, that before such copy of the said declaration in ejectment was so fixed, as aforesaid, there was due to him this deponent, as landlord of such messuage, (or, "lands, tenements, or hereditaments,") with the appurtenances, from C. D., the tenant thereof, the sum of £ for half a year's rent, upon and by virtue of a certain indenture of lease, bearing date, &c. and made between, &c. and that no sufficient distress was then to be found upon the said messuage, (or, "lands, tenements, or hereditaments,") with the appurtenances countervailing the arrears of rent then due to this deponent : And this deponent further saith, that at the time of affixing the copy of the said declaration in ejectment, as aforesaid, he had power to re-enter the said messuage, (or, "lands, tenements, and hereditaments,") with the appurtenances, by virtue of the said lease, for the nonpayment of the rent so in arrear, as aforesaid.

Sworn, (&c.)

A. B.

I. K.

#### No. 20.

Rule for  
judgment for  
the whole  
premises in  
K. B.

next after

in the

year, of, &c.

Doe on the demise of A. B. }

v. Roe, - - - - - } Unless the tenant in possession of (or, if the premises are untenanted, "unless some person claiming title to,") the premises in question shall appear and plead to issue, on

[ \*355 ]

next after let judgment be entered for the plaintiff, against the now defendant Roe by default.

Upon the motion of Mr.

By the Court.

#### No. 21.

The like,  
for part.

Doe on the demise of A. B. } Unless C. D., tenant in possession of part of the premises  
v. Roe, - - - - - }

in question, shall appear and plead to issue, on next  
after let judgment be entered for the plaintiff,  
against the now defendant Roe, by default : But execution shall  
issue for such part of the premises only as is in his possession.

Upon the motion of Mr.

By the Court.

No. 22.

Doe on the demise of A. B. } Unless C. D., (&c. tenants in The like,  
v. Roe, - - - - - } possession of part of the premi- where part  
ses in question, and unless or some other of the pre-  
person claiming title to such part of the said premises as are mises are  
untenanted, shall appear and plead to issue, on tenanted,  
next after let judgment be entered for the plaintiff, and part un-  
against the now defendant Roe, by default : But execution shall tenanted.  
issue for such part of the premises only as is in the possession  
of the said tenants, and such other parts as are untenanted.

By the Court.

\*No. 23.

[ \*356 ]

As yet of term, in the  
year, &c.

Witness, Edward Lord Ellenborough.

(to wit,) John Doe, on the demise of A. B. puts in  
his place I. K. his attorney, against Richard Roe, in a plea of  
trespass and ejectment of farm.

Judgment  
for the  
plaintiff  
by nil dict  
by original  
in K. B.  
with a re-  
mitter  
damna.

—(to wit.) The said Richard Roe in per-  
son, at the suit of the said John Doe, in the plea aforesaid.

—(to wit.) Richard Roe was attached  
to answer John Doe, &c. (*copy the declaration to the end,  
omitting the notice, and proceed on a new line as follows :*)

And the said R. R. in his proper person, comes and defends  
the force and injury, when, &c. and says nothing in bar or pre-  
clusion of the said action of the said J. D. whereby the said J.  
D. remains therein undefended against the said R. R. : There-  
fore, it is considered, that the said J. D. recover against the said  
R. R. his said term yet to come, of and in the tenements afore-  
said, with the appurtenances and also his damages sustained  
by reason of the trespasss and ejectment aforesaid : And here-  
upon the said J. D. freely here in court remits to the said R. R.  
all such damages, costs, and charges, as might, or ought to be

adjudged to him, the said J. D. by reason of the trespass and ejectment as aforesaid : therefore, let the said R. R. be acquitted of those damages, costs, and charges, &c. : And hereupon the said J. D. prays the writ of the said lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his said term yet to come, of \*and in the tenements aforesaid, with the appurtenances ; and it is granted to him, returnable before the said lord the king, on \_\_\_\_\_ wheresoever, &c.

## No. 24.

Consent of  
attornies,  
for the ten-  
ant to be ad-  
mitted to defend, &c.  
in K. B.

\_\_\_\_\_ on, (or, next after,) \_\_\_\_\_  
in the \_\_\_\_\_ year, &c.

\_\_\_\_\_ (to wit.) Doe on the demise  
of A. B. against Roe, for  
messuages, &c. in the parish of  
in the said county : (or, if  
*there be several demises, say*) " Doe on  
the demise of A. B. for  
messuages, (&c.) in the parish of  
in the said  
county, and, also, on the demise of E.  
F. for other messuages,  
(&c.) in the parish of  
in the said county, against Roe ;" and  
*if the tenant appear for part only, add,*  
" being part of the premises mention-  
ed in the declaration."

It is ordered by the  
consent of the attor-  
nies for both parties,  
that C. D. be made  
defendant in the stead  
of the now defendant  
Roe, and do forthwith  
appear at the suit of  
the plaintiff; and (if  
*the ejectment be by bill*)  
file common bail, and  
receive a declaration in  
an action of trespass  
and ejectment, for the  
premises in question,

and forthwith plead thereto not guilty, and upon the trial of the  
issue,\* confess lease, entry, and ouster, and insist upon the title  
only ; otherwise let judgment be entered for the plaintiff against  
the now defendant Roe, by default : And if, upon the trial of  
the said issue, the said C. D. shall not confess lease, entry, and  
ouster, whereby the plaintiff shall not be able further to prose-  
cute his writ (or " bill,") against the said C. D. then no costs  
shall be allowed for not further prosecuting the same, but the said  
C. D. shall pay costs to the plaintiff, in that case to be taxed :  
And it is further ordered, that if, upon the trial of the said issue  
a verdict shall be given for the said C. D. or it shall happen  
that the plaintiff shall not further prosecute his said writ (or  
" bill,") for any other cause, than for not confessing lease, en-

try, and ouster, then the lessor of the plaintiff shall pay to the said C. D. costs in that case to be adjudged.

I. K. attorney for the plaintiff,

L. M. attorney for the defendant.

No. 25.

In the Common Pleas.

\_\_\_\_\_ term in the \_\_\_\_\_ year, &c. Consent  
Rule in C.  
P.  
\_\_\_\_\_ the \_\_\_\_\_ day of

\_\_\_\_\_ (to wit.) Doe, on the demise of A. B. } It is ordered  
against Roe, for \_\_\_\_\_ messuages, &c. (as } by consent of  
*in the last precedent.* } I. K. attorney  
for the plaintiff, and L. M. attorney for C. D., who claims title  
to the tenements in question, that the said C. D. shall be ad-  
mitted defendant, and that the said C. D. shall immediately ap-  
pear by his said attorney, who shall receive a declaration, and  
plead thereto the general issue, this term; and that at the trial to  
be had thereon, the said C. D. shall appear in his proper person,  
or by his counsel or attorney, and confess lease, entry, and  
oust-<sup>\*</sup>er for so much of the tenements specified in the plaintiff's [ \*359 ]  
declaration, as are in the possession of the said defendant or  
his tenant, or any person claiming by, or under his title; or  
that, in default thereof, judgment shall be thereupon entered  
against the defendant, Richard Roe, the casual ejector: but  
proceedings shall be stayed against him, until default shall be  
made in any of the premises. And, by the like consent, it is  
further ordered, that if, by reason of any such default, the  
plaintiff shall happen to be nonsuited upon the trial, the said C.  
D. shall take no advantage thereof, but shall thereupon pay to  
the plaintiff costs, to be taxed by the prothonotaries. And it is  
further ordered, that the lessor of the plaintiff shall be liable  
to the payment of costs to the said C. D. by the Court here,  
to be in any manner allowed or adjudged.

By the Court.

No. 26.

In the King's Bench.

C. D. of \_\_\_\_\_ maketh oath, and saith, that no actual Affidavit in  
support of  
rule, to su-

thorize the tenant to confess lease and entry only in K. B. ouster of the lessor of the plaintiff has been committed by this deponent, and that (as he, this deponent, verily believes,) this ejectment may involve a question between tenants in common, or joint-tenants.

Sworn, (&c.)

C. D.

No. 27.

Rule in K. B. to authorize the tenant to confess lease and entry only. [ \*360 ] Doe, on the demise of A. B. } Upon reading the rule made yesterday, and upon hearing Mr. ——— v. Roe - - - - - } &c. for \*the lessor of the plaintiff, and Mr. ——— &c. for the tenant; it is ordered, that the defendant enter into a rule for confessing lease and entry, and also for confessing ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise.

By the Court.

No. 28.

Consent Rule thereon. Doe } It is ordered, &c. (as in No. 24. to \*) confess lease v. } and entry, and also ouster of the nominal plaintiff, in Roe. } case an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise, and insist upon the title, and such actual ouster only; otherwise let judgment be entered for the plaintiff against the now defendant Roe, by default. And if, upon the trial of the said issue, the said C. D. shall not confess ——— lease and entry, and also ouster, upon the condition aforesaid, whereby, &c. (as in No. 24. to †) confessing lease and entry, and also ouster subject to the conditions aforesaid, then the lessor of the plaintiff shall pay to the said C. D. costs in that case to be adjudged.

By the Court.

No. 29.

Rule in K. B. for admitting the landlord to defend, &c. Doe, on the demise of A. B. } It is ordered, that E. F. landlord v. Roe - - - - - } of the tenant in possession of the premises in question in this cause, shall be joined and made defendant with the said tenant, if he shall appear: And the said [ \*361 ] E. F. desiring, if the said tenant \*shall not appear, that he may appear by himself, and consenting that in such case he will enter into the common rule to confess lease, entry, and ouster, in such manner as the said tenant ought, in case he had appear-

ed : (or if the rule be special, to confess lease and entry only, say, "to confess lease and entry only, without ouster, unless an actual ouster of the lessor of the plaintiff, by the said C. D. or those claiming under him, be proved at the trial,") leave is given to the said E. F. pursuant to the late act of Parliament, if the said tenant shall not appear, to appear by himself, and upon his entering into such Common Rule, to become defendant in the stead of the casual ejector, and to defend his title to the said premises without the said tenant : the plaintiff nevertheless is at liberty to sign judgment against the casual ejector ; but execution thereon is stayed, until the Court shall further order. Upon the motion of Mr. \_\_\_\_\_

By the Court.

No. 30.

C. D. . . . . } term, (&c.) And the *Plea of not*  
ats. } said C. D., by L. M., his attor- *guilty.*  
Doe, on the demise of A. B. } ney, comes and defends the force  
and injury, when, &c. and says that he is not guilty of the sup-  
posed trespass and ejectment, (or if several ousters are laid in  
the declaration, "of the supposed trespasses and ejectments,")  
above laid to his charge, in manner and form as the said John  
Doe hath above thereof complained against him ; and of this  
he, the said C. D., puts himself upon the country, &c.

\*No 31.

C. D. . . . . } And the said \_\_\_\_\_ by \_\_\_\_\_ [ \*362 ]  
ats. } his attorney comes and defends *Plea of an-*  
Doe, on the demise of A. B. } the force and injury, when, &c. *cient de-*  
and says, that all the tenements and premises in the declaration  
aforesaid specified, in which the trespass and ejectment are  
above supposed to have been done, are held of \_\_\_\_\_ as  
of his manor of \_\_\_\_\_ in the county of \_\_\_\_\_ and  
which said manor is, and from time whereof the memory of man  
is not to the contrary, was of ancient demesne of the crown of  
the king of England, and now of our lord the king ; and that the  
aforesaid tenements and premises are, and for all the time afore-  
said, were pleaded and pleadable in the Court of the same man-  
or by patent writ of our lord the king, of right close only, and  
not elsewhere or otherwise ; and this he is ready to verify as

the Court shall think proper : Wherefore, he prays judgment, if the Court of our said lord the king, now here, will take cognisance of the said plea, &c.

## No. 32.

*Affidavit to accompany plea of ancient demesne.*

C. D. the tenant in possession of the premises in the declaration of ejectment in this cause above mentioned, maketh oath, and saith, that the said premises in the said declaration in this cause above mentioned, with the appurtenance, are held of—  
 —————as of his manor of—————in the county of—————and which said manor is holden  
 [ \*363 ] in an-<sup>\*</sup>cient demesne : And this deponent further saith, that there is a Court of ancient demesne held within the said manor of —————and that there are suitors in the same Court, in which said Court, and before which suitors the said A. B. the lessor of the plaintiff above named might have proceeded in the said ejectment ; and this deponent further saith, that to the best of this deponent's knowledge and belief, the said A. B., the said lessor of the plaintiff is seised in his demesne as of fee, of and in the said premises, with the appurtenances in the said declaration of ejectment mentioned. C. D.  
 Sworn, &c.

## No. 33.

*Postea for defendant on a nonsuit for not confessing lease, entry, and ouster.*

Afterwards, that is to say, on, &c. at, &c. before, (&c.) comes the within named John Doe, by his attorney within mentioned, and the within named C. D. although solemnly required, comes not, but makes default ; therefore, let the jurors of the jury whereof mention is within made, be taken against him by his default ; and the jurors of that jury being summoned also to come, and to speak the truth of the matters within contained, being chosen, tried, and sworn, the said C. D., although solemnly called to appear by himself or his counsel or attorney, to confess lease, entry, and ouster, doth not come, by himself or his counsel or attorney, nor doth he confess lease, entry, and ouster, but therein makes default ; wherefore the said John Doe doth not further prosecute his writ, (or bill,) against the said C. D.

Therefore, (&c.)

## \*No. 34.

[ \*364 ]

(*To the end of issue, and then as follows :*) At which day, before our lord the king at Westminster, comes, (*or in the Common Pleas or Exchequer*, "At which day comes here,") the parties aforesaid by their attorneys aforesaid; and hereupon the said C. D. as to ——— parcel of the tenements in the said declaration mentioned, relinquishing his said plea by him above pleaded, says, that he cannot deny the action of the said John Doe, nor but that he, the said C. D. is guilty of the trespass and ejectment above laid to his charge, in manner and form as the said John Doe hath above thereof complained against him : And upon this the said John Doe says, that he will not further prosecute his suit against the said C. D. for the trespass and ejectment in the residue of the tenements aforesaid; and he prays judgment, and his term yet to come, of and in the said ——— with the appurtenances, parcel, &c. together with his damages, costs, and charges, by him in this behalf sustained : Therefore, it is considered, that the said John Doe do recover against the said C. D. his said term yet to come, of and in the said ——— with the appurtenances, parcel, (&c.) and also £ ——— for his said damages, costs, and charges, by the Court of the said lord the king now here adjudged to the said John Doe, and with his assent, and also with the assent of the said C. D. : And let the said C. D. be acquitted of the said trespass and ejectment in the residue of the tenements aforesaid, and go thereof without day, (&c.) : And the said John Doe prays the writ of our said lord the king, to be directed to the sheriff of ——— aforesaid, to cause him to [ \*365 ] have possession of his said term yet to come of, and in the said ——— with the appurtenances, parcel, (&c.) and it is granted to him, returnable before our said lord the king on ——— wheresoever, (&c.) (*or in the Common Pleas or Exchequer*, "returnable here on ——— &c.")

## No. 35.

Doe on the demise of A. B. } Upon reading a rule made in Rule for execution against the casual ejector, where the landlord had been made defendant, and failed at the trial.  
 v. Roe, - - - - - } this cause on ———  
 ——— and E. F., therein named, having made himself defendant in the stead of the casual ejector, pursuant to the said rule and the postea in the said cause being produced and read, and a rule made in the same cause this day; it is ordered, that



the said E. F. upon notice of this rule to be given to his attorney, (&c.) show cause, why the plaintiff should not have leave to sue out execution, upon the judgment signed against the casual ejector pursuant to the first mentioned rule. Upon the motion of Mr.———

By the Court.

No. 36.

*Habere facias possessionem.*

George the Third, (&c.) To the sheriff of——greeting : Whereas, John Doe, lately in our Court before us at Westminster, by our writ, (*or if by bill, say, "by bill without our writ,"*) and by the judgment of the same court recovered against C. D. (*or if the judgment be by default "against Richard Roe,"*) his term then and yet to come, of and in——dwelling houses, &c. [ \*366 ] *\*(as in the declaration in ejectment)* with the appurtenances, situate, &c. which A. B., on, &c. had demised to the said J. D., to hold the same to the said J. D. and his assigns, from &c. for and during, and unto the full end and term of——years from thence next ensuing, and fully to be complete and ended, *\*by virtue of which said demise, the said J. D. entered into the said tenements with the appurtenances, and was possessed thereof, until the said C. D. afterwards (to wit,) on, &c. with force and arms, (&c.) entered into the said tenements with the appurtenances, which the said A. B. had demised to the said J. D. in manner, and for the term aforesaid, which was not then, nor is yet expired, and ejected the said J. D. from his said farm(—; whereof the said C. D. is convicted, as appears to us of record ; therefore we command you, that without delay you cause the said J. D. to have the possession of his said term yet to come of and in the tenements aforesaid, with the appurtenances : and in what manner you shall have executed this our writ, make appear to us, on wheresoever we shall then be in England, (or by bill, "to us at Westminster, on next after ,")†) and have there (or by bill, "have there then,") this writ. Witness, Edward Lord Ellenborough, (&c.)*

No. 37.

*The like, on a double demise.*

(As in preceding precedent to\*;) and also his term, then, and yet to come, of and in other dwelling houses, (&c.) with the appurtenances, which E. F., on, &c. had demised to

the said J. D., to hold the same to the said J. D. and his assigns, from, &c. for and during, and unto, \*the full end and term [ \*367 ] of        years from thence next ensuing, and fully to be complete and ended; by virtue of which said several demises, the said J. D. entered into the said several tenements with the appurtenances, and was possessed thereof, until the said C. D. afterwards, to wit, on, &c. with force and arms, &c. entered into the said several tenements with the appurtenances, which the said A. B. and E. F. had respectively demised to the said John Doe, in manner, and for the several terms aforesaid, which were not then, nor are yet expired, and ejected the said J. D. from his said several farms; whereof the said C. D. is convicted, (*adding in K. B.* "as appears to us of record:") therefore we command you, that without delay, you cause the said J. D. to have the possession of his said several terms yet to come, of and in the said several tenements, with the appurtenances: and in what manner, &c. (*as in the preceding precedent to the end.*)

## No. 38.

(As in No. 36. to †.) We also command you, that of the goods and chattels of the said C. D. in your bailiwick, you cause to be made        £. which the said J. D., lately in our said Court before us, at Westminster, aforesaid, recovered against the said C. D. for his damages, which he had sustained, as well on occasion of the trespass and ejectment aforesaid, as for his costs and charges by him, about his suit, in that behalf expended; whereof the said C. D. is convicted, as appears to us of record: and have you the moneys before us, on the return day aforesaid, wheresoever, (&c.) to be rendered to the said John Doe, \*for his damages aforesaid, and have there [ \*368 ] this writ.

Witness, Edward Lord Ellenborough.

## No. 39.

(As in No. 36, to †) we also command you, that you take the said C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us on the return day aforesaid, wheresoever, (&c.) to satisfy the said J. D. D.        £. which our said Court before us, at Westminster

*The like, and fieri facias for costs, by original in K. B.*

*The like, and capias ad satisfaciendum for costs by original in K. B.*

aforesaid, were adjudged to the said J. D., for his damages, which, &c. (*as in preceding precedent to the end.*)

## No. 40.

The like,  
and also for  
costs in er-  
ror, on an  
affirmance  
in the  
House of  
Lords.

(Copy the last precedent to the end, omitting the words "and have there this writ," and then as follows :) and also £ which in our Court of Parliament were adjudged to the said J. D., according to the form of the statute in such case made and provided, for his damages, costs and charges, which he had sustained and expended, by reason of the delay of execution of the judgment aforesaid, on pretext of prosecuting our writ of error, brought thereupon by the said C. D. against the said J. D. in the same Court of Parliament, the said judgment being there in all things affirmed: whereof the said C. D. is also convicted, as by the inspection of the record and proceedings thereof, remitted from our said Court of Parliament into our said Court before us, likewise appear to us of record; and have there this writ. Witness, (&c.)

## \*No. 41.

[ \*369 ]

Writ of res-  
titution.

(As in No. 36. to "whereof the said C. D. is convicted," &c. and then as follows :) and whereas we afterwards, to wit, in — term aforesaid, by our writ, commanded, you, that without delay you should cause the said J. D. to have possession of his said term, then to come, of and in the tenements aforesaid, with the appurtenances; and that you should make known to us on a day now past, in what manner you should have executed that our writ: and because since the issuing of our said writ, it hath appeared to us, that the said judgment obtained by the said J. D., in manner aforesaid, was irregularly obtained, and that our said writ thereupon issued improvidently and unjustly; therefore, we command you, that if possession of the tenements aforesaid, with the appurtenances, hath, by virtue of our said writ, been given or delivered to the said J. D., then that without delay you cause restitution of the said tenements with the appurtenances, to be made to the said G. H. or his assigns, at whose instance the judgment aforesaid hath been set aside by our said Court, he, the said G. H., being landlord and owner of the tenements aforesaid with the appurtenances; and that whatever has been done by virtue of our said writ you deem altogether void, and of no effect, as you will answer the con-

trary at your peril : and in what manner, &c. (as in No. 34 to the end.)

## No. 42.

(As in No. 36. to this mark ~~§~~, and then as follows :) and *Scire facias* also £. ——— for the damages which the \*said John Doe had <sup>for the plaintiff.</sup> sustained, as well on occasion of the trespass and ejectment [ \*370 ] aforesaid, as for his costs and charges by him about his suit in that behalf expended ; whereof the said C. D. is convicted ; as appears to us of record : And now, on the behalf of the said J. D. in our said Court before us, we have been informed, that although judgment be thereupon given, yet execution of that judgment still remains to be made to him ; wherefore the said J. D. hath humbly besought us to provide him a proper remedy in this behalf ; and we being willing that what is just in this behalf should be done, command you, that by honest and lawful men of your bailiwick, you make known to the said C. D. (if against the casual ejector “ to the said Richard Roe, and also to ——— and ——— the tenants in possession of the premises aforesaid,”) that he (or they,) be before us, on ——— wheresoever, (&c.) to show if he has or knows of any thing to say for himself, or, (if they have or know, or if either of them hath or knoweth, of any thing to say for themselves or himself,) why the said J. D. ought not to have the possession of his said term yet to come, of and in the tenements aforesaid, and also execution of the damages, costs and charges, aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient for him so to do, and further to do and receive what our said Court before us shall consider of him, (or them,) in this behalf : And have there the names of those by whom you shall so make known to him, (or them,) and this writ.

Witness, Edward Lord Ellenborough, (&c.)

## \*No. 43.

Doe, on the demise of A. B. } Upon reading the affidavit of <sup>Rule for</sup> *v. Roe* - - - - - } L. M. (&c.) it is ordered, that <sup>staying pro-</sup> the lessor of the plaintiff, upon notice, (&c.) show cause, why <sup>ceedings,</sup> further proceedings in this action should not be stayed, until a guar- <sup>till a guar-</sup> dian be ap- <sup>dian be ap-</sup> pointed for <sup>an infant</sup> sufficient guardian be appointed for the lessor of the plaintiff, <sup>lessor to an-</sup> who will undertake to pay to the defendant such costs as may <sup>swer costs.</sup> [ \*371 ]

happen to be adjudged to him; and that in the mean time further proceedings be stayed. Upon the motion of Mr. ———

By the Court.

No. 44.

The like,  
till security  
be given for  
costs,

Doe, on the demise of A. B. } Upon reading the affidavit of  
v. Roe - - - - - } L. M. and another, it is ordered,  
that the lessor of the plaintiff, upon notice, (&c.) show cause,  
why further proceedings in this action should not be stayed, until  
\* sufficient security be given to answer the defendant his costs,  
in case the plaintiff be nonsuited, or a verdict shall be given for  
the said defendant: and that in the mean time further proceedings  
be stayed. Upon &c.

No. 45.

The like, in  
C. P. until  
the costs are  
paid of a  
former ac-  
tion in K. B.

(As in No. 44. to \*) the costs taxed in a former action  
brought in the Court of King's Bench, on the demise of the les-  
sor of the plaintiff, for the same premises, are paid; and in the  
mean time and until this Court shall otherwise order, that all  
further proceedings be stayed. Upon, &c.

[ \*372 ]

\*No. 46.

The like,  
on payment  
of mortgage  
money, &c.

Upon reading the affidavit of G. H., it is ordered, that the les-  
sor of the plaintiff, upon notice, (&c.) shall show cause, (&c.)  
why upon the defendant's bringing into this Court the principal  
money and interest due to the lessor of the plaintiff upon  
his mortgage, and also such costs as have been expended in  
any suit or suits at law or equity upon such mortgage, his  
costs in this cause to be ascertained, computed, and taxed, by  
one of the prothonotaries, the money so brought into this Court  
should not be deemed and taken to be in full satisfaction and  
discharge of such mortgage; and upon payment thereof to the  
lessor of the plaintiff, why all proceedings in this action should  
not be stayed; and why the mortgaged premises, and the les-  
sor of the plaintiff's estate and interest therein, should not be  
assigned and conveyed, at the cost and charges of the defend-  
ants, to such person as they shall appoint; and why all deeds,  
evidences, and writings, in the custody of the lessor of the  
plaintiff, relating to the title of such mortgaged premises, should  
not be delivered up to the defendants, or to such person or per-  
sons as they shall for that purpose nominate and appoint.

By the Court.

## No. 47.

Doe on the demise of A. B. } Upon reading the affidavit of <sup>The like,</sup>  
 v. Roe. - - - - - } the defendant, it is ordered upon <sup>on payment</sup>  
 the said defendants's forthwith bringing into Court the whole <sup>of rent, &c.</sup>  
 rent due and in arrear, and such sum to answer the costs as <sup>in K. B.</sup>  
 the master shall direct, that further proceedings \*in this cause [ \*373 ]  
 be stayed. And it is referred to the master to compute the said  
 arrears of rent, and to tax the said costs; and upon the said  
 defendant's paying the said lessor of the plaintiff what the  
 said master shall find due, and allow for the said rent and costs,  
 that all further proceedings therein as to the non-payment of  
 the said rent, be stayed. But it is further ordered, if the said  
 lessor of the plaintiff has any other title to the premises in ques-  
 tion, than for the non-payment of the said rent, he is at liberty  
 to proceed. Upon the motion of Mr. ———

By the Court.

## FORMS IN EJECTMENT,

ADAPTED TO THE "REVISED STATUTES" OF THE STATE OF NEW-YORK.

◆

Most of the following Forms were selected by the Supreme Court, as *Precedents*, and annexed to the Rules of that Court, adopted at the *October Term*, 1829. The residue (as well as those selected by the Supreme Court,) were submitted to the perusal of Benjamin F. Butler, Esq. one of the Revisers; such amendments as he suggested, were made, and the whole are now inserted in this Collection, under the belief that they will be found to be useful and correct.

§ 1. *Declaration in Ejectment, for the Entirety ; where the Plaintiff claims in Fee ; or, for his own Life ; or for that of another.*(a)

SUPREME COURT.

Of the term of . . . . in the year of our Lord,  
one thousand eight hundred and thirty.

County of . . . . , to wit : *A. B.* by *E. F.*, his attorney, (b) complains of *C. D.*, being in custody, &c. For that whereas the said *A. B.* on the . . . . day of . . . , in the year of our Lord one thousand eight hundred and . . . . [*some Day after the Title accrued,*(c)] was possessed of a certain dwelling-house and garden, [or, "of a certain lot of woodland;" or, "of a certain orchard;" or otherwise, as the Case may be,] with the appurtenances, situate in the town of . . . . in the said county of . . . . , and being known and designated as lot, [or, "as parcel of lot," or, "as subdivision Number . . . . of lot,"] Number . . . in . . . range of townships, of a certain tract of land called and known as . . . . Patent, [or, "Purchase," or, if the Premises cannot be so described, then say, "and adjoining Northwardly, to lands late in the occupation of *G. H.* ; Southwardly, to lands late in the occupation of *J. K.* ; Eastwardly, to lands late in the occupation of *L. M.* ; and Westwardly, to lands late in the occupation of *N. O.* ;" or, if there have been no Occupants of such adjacent Lands, then, stating the natural boundaries, if any ; and if none, describing such premises by metes and bounds ; or in some other way, so that from such description, possession of the pre-

(a) Vide "*Revised Statutes*," Part 3, Chap. 5, Tit. 1, § 10 (Vol. 2, p. 304.)

(b) Vide "*Revised Statutes*," Part 3, Chap. 6, Tit. 1, § 26, (Vol. 2, p. 351.)

(c) Vide "*Revised Statutes*," Part 3, Chap. 5, Tit. 1, § 7, (Vol. 2, p. 304.)

prises claimed may be delivered, (a)] which said premises the said *A. B.* claims in fee; [or, "for his own life;" or, "for the life of one *R. S.*;" as the Case may be, (b)] and he, the said *A. B.*, being so possessed thereof, the said *C. D.*, afterwards, to wit, on the . . . day of . . . , in the year of our Lord one thousand eight hundred and thirty, (c) entered into the said premises, and ejected the said *A. B.* therefrom; and unjustly withholds from the said *A. B.* the possession thereof; to the damage of the said *A. B.* of . . . dollars; [any nominal Sum the Plaintiff shall think proper to state, (d)] and therefore he brings his suit, &c.

*E. F.* Attorney for Plaintiff.

### § 2. *The like, for an undivided Share or Interest. (e)*

[As in § 1, to and including the Words, "was possessed of," and then proceed as follows:] the one equal undivided moiety, [or, "the one equal undivided third, (or, 'fourth,' or other) part," according to the Share or Interest the Plaintiff claims, (e)] of a certain dwelling-house and garden, &c. [describing the Premises as directed in § 1,] which said premises the said *A. B.* claims in fee: [or, "for his own life;" or, "for the life of one *R. S.*" according as the Case may be, (f)] and he the said *A. B.* being so possessed thereof, the said *C. D.*, afterwards, to wit, on the . . . day of . . . , in the year of our Lord one thousand eight hundred and thirty, entered into the said one equal undivided moiety, [or, "third," (or, 'fourth,' or other,) part," accordingly to the Share or Interest the Plaintiff claims,] of the said premises, and ejected, &c. [as in § 1, to the End.]

### § 3. *Declaration, where the Plaintiff claims for a Term of Years. (f)*

[As in § 1, or § 2, (as the Case may be,) to the End of the Description of the Premises; and then as follows:] which said premises, the said *A. B.* claims, upon the demise of one *R. S.*, for a term of years, (f) to wit, for the term of . . . years, from the . . . day of . . . last past, [or, "in the year of our Lord one thousand eight hundred and . . . "] thence next ensuing, and fully to be complete and ended; and the said *A. B.* being so possessed thereof, &c. [as in § 1, or § 2, to and including the Words, "the said premises," and then as follows:] which the said *R. S.* had demised as aforesaid, for the term aforesaid, which is not yet expired, and ejected the said *A. B.* therefrom, &c. [as in § 1, to the End.]

### § 4 *Declaration by several Plaintiffs. (g)*

[Caption as in § 1.]

County of . . . to wit: *A. B.*, *W. X.* and *Y. Z.*, by *E. F.*, their attorney, complain of *C. D.* being in custody, &c. For that whereas the said *A. B.*, *W. X.* and *Y. Z.*, on the . . . day of . . . , in the year of our Lord one thousand eight hundred and . . . , were possessed of a certain dwelling-house and garden, &c. [Describe the Premises as directed in § 1, § 2, or § 3 and then proceed as follows:]

(a) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 8, (Vol. 1, p. 304.)

(b) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 10, (Vol. 2, p. 304.)

(c) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 7, (Vol. 2, p. 304.)

(d) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 7, (Vol. 2, p. 304.)

(e) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 9, (Vol. 2, p. 304.)

(f) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 10, (Vol. 2, p. 304.)

(g) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1 § 11, (Vol. 2, pp. 304, & 305.)



which said premises the said *A. B.*, *W. X.* and *Y. Z.* claim in fee; [or, "for their joint lives;" or, "for the life of *R. S.*;" or, otherwise, as the Case may be, (a)] and the said *A. B.*, *W. X.* and *Y. Z.*, being so possessed thereof, the said *C. D.*, afterwards, &c. [as § 1, § 2, or § 3, to the Words, "the possession thereof;" substituting the Word "them," for the Word "him," throughout.]

*Second Count:* And also, for that whereas the said *A. B.*, on, &c. [As in § 1, § 2, or § 3, to and including the Words, "the possession thereof;" and prefixing the Word, "other," to the Description of the Premises.]

*Third Count:* And also for that whereas the said *W. X.*, on, &c. [As directed in the second Count; substituting the Name of "*W. X.*," for that of *A. B.*," throughout.]

*Fourth Count:* And also, for that whereas the said *Y. Z.*, on, &c. [As directed in the second Count; substituting the Name of *Y. Z.*," for that of "*A. B.*," and conclude as follows:] to the damage of the said *A. B.*, *W. X.* and *Y. Z.*, of . . . . dollars, [any nominal Sum the Plaintiffs shall think proper to state,] and therefore they bring their suit, &c.

*E. F.* Attorney for Plaintiffs.

#### § 5. Declaration in Ejectment, for Dower. (b)

[Caption as in § 1.]

County of . . . . to wit: *E. B.*, by *E. F.*, her attorney, complains of *C. D.*, being in custody, &c. For that whereas, the said *E. B.*, on the . . . . day of . . . ., in the year of our Lord one thousand eight hundred and . . . ., was possessed of the one undivided third part of, &c. [Describe the Premises as directed in § 1.] as her reasonable dower, as widow of *A. B.*, deceased, late the husband of the said *E. B.*, (a) and the said *E. B.* being so possessed thereof, the said *C. D.*, afterwards, to wit, on the . . . . day of . . . ., in the year aforesaid, entered into the said undivided third part of the said premises, &c. [as in § 1 to the End.]

#### § 6. Notice to Defendant, to be subjoined to Declaration, (c)

To Mr. *C. D.*,

You are hereby notified that the declaration, with a copy whereof, you are now herewith served and to which copy this notice is subjoined, will be filed on the . . . . day of . . . . next, [or, "instant,"] being the first, [or, "second," or other as the Case may be,] day of the next, [or, "present,"] term of the Supreme Court of Judicature of the People of the State of New-York: That upon filing the same, a rule will be entered, requiring you to appear and plead to the said declaration, within twenty days after the entry of such rule: And, that if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration. Dated, this . . . . day of . . . . 1830.

Yours, &c.

*E. F.* Attorney for Plaintiff,  
[or, *A. B.*, in Person."] (c)

(a) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 10, (Vol. 2, p. 304.)

(b) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 2, (Vol. 2, p. 303.) *Ibid.* Tit. 7, § 24, (Vol. 2, p. 343.)

(c) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 12, (Vol. 2, p. 305.)

§ 7. *Affidavit of personal Service of Declaration and Notice,*(a)  
SUPREME COURT,

A. B. }  
vs. }  
C. D. }

County of . . . . to wit: J. K. of . . . . being duly sworn, deposes and says, that he did on the . . . . day of . . . . last past, [or, "instant,"] personally serve C. D. the defendant in this suit, who is the actual occupant of [or, "the person exercising acts of ownership on," or, "claiming title to," or, "claiming some interest in,"] the premises for which this action is brought, (b) with a true copy of the declaration hereunto annexed; and also a true copy of the notice in writing, to the said declaration subjoined, and likewise hereunto annexed; and further this deponent says not. J. K.

Subscribed and sworn, this }  
. . . day of . . . 183 . }

Before me,

L. M., Commissioner, &c.

§ 8. *Affidavit of Service, (not Personal) of Declaration and Notice.*

[The same, (with the Omission of the Words, "personally,") as in § 7, until and including the Words, "and likewise hereunto annexed;" and then proceed as follows:] by leaving the same with one T. U., being a person of proper age, at the dwelling-house of the said defendant C. D., he being absent; (c) [or, "at the residence of the said defendant C. D. because he could not be found;" (d)] and further this deponent says not. J. K.

Subscribed and Sworn this }  
. . . day of . . . 183 . }

Before me,

L. M. Commissioner, &c.

§ 9. *Affidavit of Defendant to support Application for Order, that Plaintiff's Attorney produce his Authority for commencing Action.*(e)  
SUPREME COURT.

C. D. }  
ads. }  
A. B. }

County of . . . to wit: C. D. the defendant in this suit being duly sworn, deposes and says, that he has not been served with proof in any way, of the authority of E. F., whose name appears on the declaration in this suit, as the attorney for the plaintiff, [or, "Plaintiffs,"]

(a) Vide, "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 16, (Vol. 2 p. 305)

(b) Vide, "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 4, (Vol. 2, p. 304.)

(c) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 13, (Vol. 2, p. 306.)

(d) *Ibid.* § 14 (Vol. 2 p. 306.)

(e) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1 §§ 17, & 18, (Vol. 2, pp. 305 & 306)

therein, to use the name, [or, "names,"] of the plaintiff, [or, "plaintiffs,"] named in the said declaration; and further this deponent says not.

*C. D.*

Subscribed and Sworn, &c. [as in § 7.]

§ 10. *Affidavit of Plaintiff's Attorney, that he is authorized to commence the Action.* (a)

SUPREME COURT.

*A. B.* }  
vs. }  
*C. D.* }

County of . . . to wit: *E. F.* attorney for the plaintiff named in the declaration in this cause, being duly sworn deposes and says, that he has received, [or, "that he did on the . . . day of . . . last past, (or, "instant,") receive,"] from the said *A. B.*, the said plaintiff, a written request of him the said plaintiff, desiring this deponent to commence this suit, [or, "a written recognition of this deponent's authority to commence this suit;"] and further this deponent says not. *E. F.*

Subscribed and Sworn, &c. [as in § 7.]

§ 11. *Rule that Defendant appear and plead.* (b)

SUPREME COURT.

*A. B.* }  
vs. }  
*C. D.* }

[Date of the Rule.]

On filing the declaration in ejectment in this cause, and the notice in writing thereto subjoined, directed to the said defendant; and on reading and filing the affidavit of due service of a copy of said declaration, and of the said notice thereunto subjoined; and on motion of *E. F.*, on behalf of the said plaintiff, it is *Ordered*, that the defendant appear and plead within twenty days, or that his default be entered. (c)

§ 12. *Plea in Ejectment.* (d)

SUPREME COURT.

*C. D.* }  
ads. }  
*A. B.* }

And the said *C. D.*, by *G. H.*, his attorney, comes and says, that he is not guilty of unlawfully withholding the premises claimed by the said

(a) Vide, "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 20, (Vol. 2, p. 306.)

(b) Vide, "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 16, (Vol. 2, p. 305.)

(c) Vide, "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 16, (Vol. 2, p. 305.)

(d) Vide, "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 22, (Vol. 2, p. 306.)

*A. B.*, as alleged in the said declaration of the said *A. B.*: And of this, he, the said *C. D.*, puts himself upon the country: And the said *A. B.* doth the like, &c.

*G. H.*, Attorney for Defendant.

§ 13. *General Verdict for the Plaintiff, in Ejectment. (a)*

Afterwards that is to say, on the day and at the place within contained, before JOHN SAVAGE, Esquire, Chief Justice, [or, "before J\*\*\* S\*\*\*, Esquire, one of the Justices,"] of the Supreme Court of Judicature of the People of the State of New-York, [or, "before J\*\*\* E\*\*\*, Esquire, Circuit Judge," as the Case may be,] according to the form of the Statute in such case made and provided, come as well the within named *A. B.* as the within named *C. D.* by their respective Attorneys within mentioned; and the Jurors of the Jury, whereof mention is within made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried and sworn, say upon their oath, that the said *C. D.* is guilty of unlawfully withholding the within described premises from the said *A. B.*; and that the said *A. B.* is well entitled to hold the same in fee, [or, "for his own life;" or, "for the life of one *R. S.*;" or, "for a term of years, &c." as in the Declaration,] as the said *A. B.* hath within complained against him; and they assess the damages of the said *A. B.* by reason of the matters aforesaid, over and above his costs and charges, by him about his suit in this behalf expended, to six cents; and for those costs and charges to six cents.

§ 14. *General Verdict for the Plaintiff, for an undivided Share or Interest. (a)*

[As in § 13, to and including the Words, "unlawfully withholding," and then as follows:] one equal undivided moiety, [or, "one equal undivided third, (or, 'fourth,' or, other,) part," according to the Share or Interest found for the Plaintiff,] of the premises within described, and that the said *A. B.* is well entitled to hold the said one equal undivided moiety, &c. in fee, &c. [as in § 13, to the End.]

§ 15. *Verdict for one of the Plaintiffs, where there are several, and for the Defendant against the others. (a)*

[As in § 13, to and including the Words, "say upon their oath," and then as follows:] that, as to the said *A. B.* the said *C. D.* is guilty, &c. [as in § 13, or § 14, (as the Case may be,) to the End, and then as follows:] and as to the said *W. X.* and *Y. Z.*, the jurors aforesaid, upon their oath aforesaid, say, that the said *C. D.* is not guilty of the matters within laid to his charge, in manner and form as the said *W. X.* and *Y. Z.* have within complained against him.

§ 16. *Verdict for Plaintiff, for Part, and for Defendant for Part. (a)*

[As in some one of the preceding Sections to and including the Words, "chosen, tried and sworn," and then as follows:] as to . . . [describe the Part accurately,] parcel of the premises within mentioned, say upon

(a) Vide, "Revised Statutes," Part 2, Chap. 5, Tit. 1, § 30, (Vol. 2, p. 307.)

their oath, that the said *C. D.* is guilty, &c. [as in some one of the preceding Sections to the End, and then as follows:] and as to the residue of the premises within mentioned, the Jurors aforesaid, upon their oath aforesaid, say, that the said *C. D.* is not guilty of the matters within laid to his charge, in manner and form as the said *A. B.* hath within complained against him.

§ 17. *Verdict for the Plaintiff, for Damages; where his Title expired before Trial. (a)*

[As in § 13 to and including the Words, "say upon their oath," and then as follows:] that the said *C. D.*, at the time of the commencement of this suit, was guilty of unlawfully withholding, &c. and that the said *A. B.* was then well entitled, &c. [as in the preceding Precedents,] and they assess the damages of the said *A. B.* by reason of the premises, over and above his costs and charges by him about his suit in this behalf expended, to . . . . dollars, (b) and for those costs and charges, to six cents. And the Jurors aforesaid, upon their oath aforesaid, further say, that the aforesaid title of the said *A. B.* to the premises within described, expired after the commencement of this suit, and before the trial, this day, of the issue within contained, to wit, on the . . . . day of . . . . , last past, [or, "in the year of our Lord one thousand eight hundred and . . . ."]

§ 18. *POSTEA on a Verdict for the Defendant.*

[As in § 13, to and including the Words, "say upon their oath," and then as follows:] that the said *C. D.* is not guilty of the matters within laid to his charge, in manner and form as the said *A. B.* hath within complained against him.

§ 19. *Special Verdict. (c)*

[As in § 13, to and including the Words, "say upon their oath," that, &c. state the Facts, and then proceed as follows:] But, whether or not, upon the whole matter aforesaid, by the Jurors aforesaid, in form aforesaid found, the said *C. D.* is guilty of the matters within laid to his charge, the Jurors aforesaid are altogether ignorant; and thereupon they pray the advice of the said Supreme Court of Judicature, before the aforesaid Justices thereof: And if, upon the whole matters aforesaid, it shall seem to the said Court, that the said *C. D.* is guilty of unlawfully withholding the within described premises from the said *A. B.*, then the Jurors aforesaid, upon their oath aforesaid, say, that the said *C. D.* is guilty thereof, in manner and form as the said *A. B.* hath within thereof complained against him; and in that case, they assess the damages of the said *A. B.*, by reason of the matters aforesaid, besides his costs and charges by him about his suit in that behalf expended to . . . . and for those costs and charges to . . . . But, if upon the whole mat-

(a) Vide, "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 30, (Vol. 2, p. 307.)

(b) It seems that these Damages must be assessed by the Jury at the trial, and cannot be recovered by a Suggestion, in the manner provided in the "Revised Statutes," Part 3, Chap. 5, Tit. 1, §§ 43 & 44. (Vol. 2, p. 310,) where the Plaintiff recovers the Premises.

(c) Vide, "Revised Statutes," Part 3, Chap. 7, Tit. 4, § 63, (Vol. 2, 421.)

ter aforesaid, it shall seem to the said Court that the said *C. D.* is not guilty of the matters aforesaid, then the Jurors aforesaid, upon their oath aforesaid, say, that the said *C. D.* is not guilty thereof, in manner and form as he hath within in pleading alleged. And because, &c. [*Add Continuance by CURIA ADVISARI VULT, as in § 21, post, pp. 436, 437.*]

§ 20. *Judgment for the Plaintiff, on a Verdict in Ejectment.*

SUPREME COURT.

Pleas before the Justices of the Supreme Court of Judicature, of the People of the State of New-York, at the Capitol in the city of Albany, (a) of the term of . . . . [*the Term of which Issue is joined*] in the year of our Lord one thousand eight hundred and . . . . , Witness, JOHN SAVAGE, Esquire, Chief Justice.

*Fairlie, Paige, Hubbard & Oliver, Clerks.*

. . . . County, to wit. Be it remembered, that on the . . . . Monday, [*or, "on the . . . . day"*] of . . . . in this same term of . . . . before the Justices of the Supreme Court of Judicature of the People of the State of New-York, at the . . . . , in the . . . . of . . . . comes *A. B.*, by *E. F.*, his Attorney, and brings into the said Court, before the aforesaid Justices thereof, now here, his certain bill against *C. D.*, being in custody, &c. in a plea of Ejectment, which said bill follows in these words, that is to say :

. . . . County to wit. *A. B.*, by *E. F.*, his Attorney, complains of *C. D.*, being in custody, &c. For that whereas, &c. [*Here copy the Declaration to the End, and proceed on a new Line as follows :*]

And the said *C. D.*, by *G. H.*, his Attorney, comes and says that he is not guilty of unlawfully withholding the premises claimed by the said *A. B.* as alleged in his said declaration; and of this he, the said *C. D.*, puts himself upon the country; and the said *A. B.* doth the like. Therefore the issue above joined, is Ordered by the said Supreme Court to be tried at the Circuit Court appointed to be held at the Court-House in the . . . . of . . . . , in and for the county of . . . . aforesaid, [*or, if in the city of New-York, "at the Circuit Court, (or, 'sittings,' (b)) appointed to be held at the City Hall, in and for the said city and county of New-York,"*] on the . . . . day of . . . . next.

And now at this day, to wit, the . . . . day of . . . . , in the year of our Lord one thousand eight hundred and . . . . , before the said Justices of the Supreme Court of Judicature aforesaid, at the . . . . in the . . . . of . . . . , comes the said *A. B.*, by his Attor-

(a) Or, "at the City-Hall in the city of New-York;" or, "at the Academy in the town of Ulster;" according to the term of the Court.

(b) The "Revised Statutes," Part. 3, Chap. 1, Tit. 4, § 26, (Vol. 2, p. 204.) contain the following provision for the holding of "Sittings" in the city of New-York :

"§ 26. Either of the justices of the supreme court may, in the May term thereof, or during any vacation of that court, on such days as the court shall by an order appoint for that purpose, try all issues which could be tried in the circuit court, for the city and county of New-York, and exercise all the powers of such court; and such sittings may be held for as many days as the judge holding the same shall think necessary. 74. (74.) L. R. L. p. 206, §§ 6 & 6."

ney aforesaid; and the said Chief Justice [or, "Justice," or, "Circuit Judge,"] before whom the said issue was tried, hath ent hither his record, had before him, in these words, to wit: Afterwards, that is to say, on the day and at the place within contained, before JOHN SAVAGE, Esquire, Chief Justice, [or, "before J. S., Esquire, one of the Justices,"] of the Supreme Court of Judicature of the People of the State of New-York, [or, "before J. E., Esquire, one of the said Circuit Judges,"] within mentioned, according to the form of the Statute in such case made and provided, come as well the within named *A. B.* as the within named *C. D.*, by their respective Attorneys within mentioned; and the jurors of the jury whereof mention is within made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried and sworn, &c. [*Here copy the POSTEA, and then proceed as follows:*]

Judgment signed this . . . day of . . . in the year of our Lord one thousand eight hundred and . . .

Therefore it is considered, that the said *A. B.* do recover against the said *C. D.* the possession of the said premises, according to the said verdict of the said Jury. (a) And it is further considered, that the said *A. B.* do recover against the said *C. D.*, his damages costs and charges by the jury aforesaid, in form aforesaid assessed, and also . . . dollars, for his said costs and charges, by the said Supreme Court, before the aforesaid Justices thereof, now here, adjudged of increase to the said *A. B.*, and with his assent, which said damages, costs and charges, in the whole, amount to . . . dollars. And hereupon the said *A. B.* prays the writ of the People of the State of New-York to be directed to the Sheriff of the county [or, "city and county,"] aforesaid, to cause

him to have possession of the said premises, according to the force, form and effect of his said recovery; and it is granted to him, returnable before the said Justices of the Supreme Court of Judicature aforesaid, at the . . . in the . . . of . . . , on the . . . Monday of . . . next.

§ 21. *The like, with a Continuance before Verdict, (b) and a Continuance after Verdict by CURIA ADVISARI VULT.*

[As in § 20, to the End of the Order for Trial, and then as follows:] And because the aforesaid issue, so as above joined in this cause between the parties aforesaid, was not tried at the said Circuit Court [or, if in the City of NEW-YORK, "at the Circuit Court, (or, 'sittings')"] held at the time and place last aforesaid, in and for the said county [or,

(a) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1 § 83, (Vol. 2, p. 306.)

(b) The "Revised Statutes," Part 3, Chap. 7, Tit. 4, § 83, (Vol. 2, p. 423,) contain the following direction respecting the entry of continuances:

"§ 83. If a cause be not tried at any circuit court or sittings, after issue shall have been joined therein, it shall be a sufficient continuance on the circuit roll, and on the record of judgment, to state the fact that such cause was not tried, and that the process between the parties is continued until the circuit when such issue shall be tried, or until the term when some judgment of the court shall be given, or some order be made concerning such suit."

"city and county;"] of . . . . Therefore the process between the parties aforesaid, is continued until the Circuit Court appointed to be held at the Court-House in the town of . . . . , in and for the county of . . . . aforesaid, [or, "until the sittings, (or, 'Circuit Court,') appointed to be held at the City Hall, in the city of New-York, in and for the said city and county,"] on the . . . . day of . . . . , in the year of our Lord one thousand eight hundred and . . . .

And now at this day, to wit, the . . . . Monday of . . . . , in the year of our Lord one thousand eight hundred and . . . . , before the Justices of the Supreme Court of Judicature aforesaid, at the . . . . in the . . . . of . . . . comes the said *A. B.*, by his Attorney aforesaid : And the said Chief Justice [or, "Justice," or, "Circuit Judge,"] before whom the said issue was tried, has sent hither his record had before him in these words to wit : Afterwards, &c. [*Here copy the POSTEA, and then proceed as follows.*] And because the said Court, before the aforesaid Justices thereof, now here, are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, before the said Justices of the Supreme Court of Judicature aforesaid, at the . . . . in the . . . . of . . . . , until the . . . . Monday of . . . . next, to hear the judgment of the said Court thereupon ; for that the said Court, before the aforesaid Justices thereof, now here, are not yet advised thereof, &c. At which day, before the said Justices of the Supreme Court of Judicature aforesaid, at the . . . . in the . . . . of . . . . , come as well the said *A. B.*, by his Attorney aforesaid, as the said *C. D.*, by his Attorney aforesaid : And thereupon all and singular the premises being seen, and by the said Court, before the aforesaid Justices thereof, now here, fully understood, and mature deliberation being thereupon had, *It is considered* by the same Court, that the said *A. B.* do recover against the said *C. D.* the possession, &c. [*as in § 20, to the End.*]

§ 2. *The like, for the Plaintiff, as to Part of the Premises, and for the Defendant as to the Residue.*

Judgment signed, &c. [*as in § 20.*]  
 [As in § 20, to the POSTEA; then copy the POSTEA, as in § 16, ANTE, pp. 433, 434, and proceed as follows:] Therefore it is considered, that the said *A. B.* do recover against the said *C. D.* his said term yet to come, [or, "his said possession,"] of and in the said . . . . parcel, &c. with the appurtenances, and the damages, costs and charges aforesaid, in form aforesaid assessed, and also . . . dollars, for his said costs and charges, by the said Supreme Court, before the aforesaid Justices thereof, now here adjudged of increase to the said *A. B.*, and with his assent ; which said damages, costs and charges in the whole amount to . . . dollars. And as to the residue of the tenements in the said declaration mentioned, whereof the said *C. D.* is acquitted in form aforesaid, let the said *C. D.* go thereof without day, &c. And hereupon the said *A. B.* prays the writ, &c. [*as in § 20, ANTE, pp. 435, 436, to the End.*]



§ 23. *The like, in another Form.*

[As in § 20, to the POSTEA; then copy the POSTEA, as § 16, ANTE, pp. 433, 434, and proceed as follows:]

Judgment signed,  
&c. [as in § 20.]

Therefore it is considered, that the said *A. B.* do recover against the said *C. D.* the possession of the said Parcel of the said Premises, according to the said Verdict of the said Jury. (a) And it is further considered, that the said *A. B.* do recover against the said *C. D.* his damages, costs and charges, by the Jury aforesaid, in form aforesaid assessed, and also . . . . dollars, for his said costs and charges, &c. [as in § 22, to the End.]

§ 24. *The like, for the Plaintiff, as to Part of the Premises, and NOLLE PROSEQUI, as to the Residue, for which there was no finding by the Jury; with Award of HABERE FACIAS POSSESSIONEM, and Return.*

[As in § 20, to the POSTEA; then copy the POSTEA, and proceed as follows:] And thereupon the said *A. B.* freely here in Court confesses, that he will not further prosecute his suit against the said *C. D.* as to the remaining three fifths [or, other Share as the Case may be,] of the tenements in the said declaration mentioned; therefore, as to the said three-fifths of the tenements aforesaid, let the said *C. D.* be acquitted, and go thereof without day, &c. And the said *A. B.* prays judgment and his term yet to come [or, "his said possession,"] of and in the said two-fifths of the tenements aforesaid, whereof the said *C. D.* is convicted, together with his damages, costs and charges aforesaid:

Judgment signed, &c.  
[as in § 20.]

Therefore it is considered, that the said *A. B.* do recover against the said *C. D.* his said term yet to come [or, "his said possession,"] of and in the said two-fifths of the tenements aforesaid with the appurtenances, and the damages, costs and charges aforesaid, by the jury aforesaid, in form aforesaid assessed, and also . . . . dollars, for his said costs and charges, by the said Supreme Court, before the aforesaid Justices thereof, now here, adjudged of increase to the said *A. B.*, and with his assent; which said damages, costs and charges in the whole amount to . . . . dollars: And hereupon the said *A. B.* prays the writ of the People of the State of New-York, to be directed to the Sheriff of the county of . . . . aforesaid, to cause him to have possession of his said term yet to come of and in the said two fifths of the tenements aforesaid, with the appurtenances; and it is granted to him, returnable before the Justices of the Supreme Court of Judicature aforesaid, at the . . . . in the . . . . of . . . ., on the . . . . Monday of . . . . next. At which day, before the said Justices, at the . . . . in the . . . . of . . . . aforesaid, comes the said *A. B.*, by his Attorney aforesaid; and the Sheriff, to wit, *S. T.* Esquire, Sheriff of the said county, now here returns, that by virtue of the said writ to him directed, he had, on the . . . . day of . . . . in the year of our Lord one thousand eight hundred and . . . ., given full and peaceable possession unto the said *A. B.* of

(a) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 33, (Vol. 2, p. 308.)

the said two-fifths of the tenements aforesaid, with the appurtenances, in the said writ mentioned, as therein he was commanded.

§ 25. *The like, in another Form.*

[As in § 20, to the *POSTEA*; then copy the *Postea* and proceed as follows:] And thereupon the said *A. B.* freely here in Court, confesses that he will not further prosecute his suit against the said *C. D.* as to the residue of the said premises in the said declaration mentioned; Therefore, as to the said residue of the premises aforesaid, let the said *C. D.* be acquitted and go thereof without day, &c. And the said *A. B.* prays judgment and the possession of the said parcel of the said premises, according to the said verdict of the said Jury, (a) together with his damages, costs and charges aforesaid, by the Jury aforesaid, in form aforesaid assessed:

Judgment signed, &c. [as in § 20.] Therefore it is considered, that the said *A. B.* do recover against the said *C. D.* the possession of the said parcel of the said premises, according to the said verdict of the said Jury. (a) And it is further considered, that the said *A. B.* do recover against the said *C. D.*, his damages, costs and charges, by the Jury aforesaid, in form aforesaid assessed, and also . . . dollars for his said costs and charges, by the said Supreme Court, before the aforesaid Justices thereof, now here, adjudged of increase to the said *A. B.*, and with his assent, which said damages, costs and charges, in the whole, amount to . . . dollars. And hereupon the said *A. B.* prays the writ of the People of the State of New-York, to be directed to the Sheriff of the county [or, "city and county,"] aforesaid, to cause him to have possession of the said parcel of the said premises, according to the force, form and effect of his said recovery; and it is granted to him, returnable before the said Justices of the Supreme Court of Judicature aforesaid, at the . . . in the . . . of . . . , on the . . . Monday of . . . next. At which day, &c. [As in § 24, to the End.]

§ 26. *The like, on a Special Verdict.*

[As in § 20, to the *POSTEA*, after copying which, proceed as follows:] And because the said Court of the same People, before the aforesaid Justices thereof, now here, are not yet advised, &c. [as in § 21, *ANTE*, pp. 436, 437, to and including the Words, "for that the said Court, before the aforesaid Justices thereof, now here, are not yet advised thereof &c."] At which day, before the said Justices of the Supreme Court of Judicature aforesaid, at the . . . in the . . . of . . . , come as well the said *A. B.* as the said *C. D.* by their respective attorneys aforesaid: And thereupon all and singular the premises being seen, and by the said Court, before the aforesaid Justices thereof, now here, fully understood, and mature deliberation being thereupon had, for that it appears to the said Court here, that the said *C. D.* is guilty of unlawfully withholding the within described premises from the said *A. B.*; and that the said *A. B.* is well entitled to hold the same in fee [or, "for

(a) Vide "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 33. (Vol. 2, p. 308.)

his own life;" or, "for the life of one *R. S.*;" or, "for a term of years, &c.," as in the Declaration,] as the said *A. B.* hath above thereof complained against him: *Therefore it is considered, &c.* [as in § 20, ANTE, pp. 435, 436, to the End.]

§ 27. *Judgment for the Plaintiff on Default.*

[As in § 20, to the End of the Declaration, and then as follows:] And now at this day, that is to say on the . . . Monday, [or, "on the . . . day"] of . . . in this same term, until which day the said *C. D.* had leave to imparl to the said bill, and then to answer the same, &c. before the said Justices of the Supreme Court of Judicature aforesaid, at the . . . in the . . . of . . . , comes the said *A. B.*, by his attorney aforesaid, and the said *C. D.* although solemnly demanded, comes not, but makes default, whereby the said *A. B.* remains therein undefended against the said *C. D.*, wherefore the said *A. B.* ought to recover against the said *C. D.* the possession of the premises in the said declaration of the said *A. B.* described; together with his costs and charges, by him about his suit in this behalf expended.

*Therefore, it is considered, &c.* [as in § 20, to the End of the Award of Return of Possession, omitting the Words, "according to the said verdict of the said jury"; and then as follows:] And it is further considered that the said *A. B.* do recover against the said *C. D.*, . . . dollars, for his costs and charges, by him about his suit in this behalf expended, by the Court now here adjudged to the said *A. B.*, and with his assent: And hereupon the said *A. B.* prays a writ to be directed, &c. [as in § 20, ANTE, pp. 435, 436, to the End.]

§ 28. *Writ of Possession. (a)*

The People of the State of New York to the Sheriff of the County [or, "City and County,"] of . . . , GREETING: *Whereas, A. B.* has lately in our Supreme Court of Judicature, by the judg.

[L. s.] ment of the said Court, recovered against *C. D.* one messuage, &c. [describing the Premises recovered, with the like Certainty as required in the Declaration,] which said premises have been, and are still unjustly withheld from the said *A. B.* by the said *C. D.* whereof he is convicted, as appears to us of record; and forasmuch as it is adjudged in the said Court that the said *A. B.* have execution upon his said judgment against the said *C. D.*, according to the force, form and effect of his said recovery; therefore we command you, that without delay, you deliver to the said *A. B.* possession of the said premises so recovered, with the appurtenances; and that you certify to our said Supreme Court of Judicature, before our Justices thereof, at the Capitol in the City of Albany, (b) on the . . . Monday of . . . next, in what manner you shall have executed this writ: And have you then there this writ. Witness, JOHN SAVAGE, Esquire, our Chief Justice, at the . . . in the . . . of . . . this . . . day of . . . in the year of our Lord one thousand eight hundred and . . .

*E. F.*, Attorney.

*Fairlie, Paige, Hubbard & Oliver*, Clerks.

(a) Vide, "Revised Statutes," Part 3, Chap. 5, Tit. 1, § 34, (Vol 2, p. 306.)

(b) Or, "at the City-Hall, in the city of New-York;" or, at the Academy, in the town of Utica;" according to the term of the Court.

§ 29. *Writ of Possession with FIERI FACIAS for Costs. (a)*

[As in § 28, to and including the Words, "in what manner you shall have executed this writ," and then as follows:] We also command you, that of the goods and chattels of the said C. D. in your bailiwick, you cause to be made . . . dollars, which in our same Court were adjudged to the said A. B. for the damages which he had sustained, as well on occasion of the matters aforesaid, as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted as appears to us of record. And if sufficient goods and chattels of the said C. D. cannot be found in your bailiwick, that then you cause the same to be made of the lands, tenements, real estate and chattels real, whereof the said C. D. was seised on the . . . day of . . . , in the year of our Lord one thousand eight hundred and . . . , or at any time afterwards, in whose hands soever the same may be: And that you have those moneys before our said Justices, on the return day aforesaid, to render unto the said A. B. for his damages aforesaid; and have you then there this writ. Witness, JOHN SAVAGE, Esquire, our Chief Justice, at the . . . in the . . . of . . . , on the . . . day of . . . in the year of our Lord one thousand eight hundred and . . .

*Fairlie, Paige, Hubbard & Oliver, Clerks.*

*E. F., Attorney.*

§ 30. *Writ of Possession, with CA. SA. for Costs. (a)*

[As in § 28, to and including the Words, "in what manner you shall have executed this writ," and then as follows:] We also command you, that you take the said C. D., if he may be found in your bailiwick, and him safely keep, so that you may have his body before our said Justices of our said Supreme Court, on the return day aforesaid, to satisfy the said A. B., . . . dollars, which were lately in our said Court adjudged to the said A. B. for his damages which he had sustained, as well on occasion of the matters aforesaid, as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted as appears to us of record: And have you then there this writ. Witness, JOHN SAVAGE, Esquire, our Chief Justice, at the . . . in the . . . of . . . this . . . day of . . . in the year of our Lord one thousand eight hundred and . . .

*Fairlie, Paige, Hubbard & Oliver, Clerks.*

*E. F., Attorney.*

§ 31. *Suggestion for the Recovery of Damages in Ejectment. (b)*

And now at this day, to wit, the . . . day of . . . , in the year of our Lord one thousand eight hundred and . . . , at the . . . in the . . . of . . . , before the said, [or, "within mentioned,"] Justices of the Supreme Court of Judicature aforesaid, [or, "within mentioned,"] comes the said, [or, "within named,"] A. B., by E. F., his Attorney, and, according to the form of the Statute in such case made

(a) Vide, "*Revised Statutes*," Part 2, Chap. 5, Tit. 1, § 24, (Vol. 2, p. 302.)

(b) Vide, "*Revised Statutes*," Part 2, Chap. 5, Tit. 1, §§ 43, 44 & 45, (Vol. 2, p. 310.)

provided, (a) suggests to the said Court, and gives the said Court, before the aforesaid Justices thereof, now here, to understand and be informed, that the said *A. B.* claims from the said, [or, "within named,"] *C. D.* the sum of . . . . dollars; in which sum the said *C. D.* is indebted to him the said *A. B.*, for the use and occupation of the premises, in the above, [or, "within,"] written judgment described, from the . . . . day of . . . ., in the year, &c. until the . . . . day of . . . ., in the year, &c. during all which time the said *C. D.* enjoyed the *mesme* profits thereof; (b) and the value of which profits, (b) amounts to the said sum of . . . . dollars, above claimed. And being so indebted as aforesaid, the said *C. D.* in consideration thereof afterwards, to wit, on, &c. [*some Day after the Recovery of the Judgment,*] at, &c. undertook, and then and there faithfully promised the said *A. B.*, to pay him, the said *A. B.*, the said sum of . . . dollars, when he the said *C. D.*, should be thereunto afterwards requested: Yet the said *C. D.*, although often requested, &c. hath not yet paid the said sum of . . . . dollars, or any part thereof, to the said *A. B.*, but so to do, hath hitherto wholly refused, and still doth refuse, to the damage of the said *A. B.* of the said sum of . . . . dollars, above claimed, &c.

*E. F.* Attorney for Plaintiff.

§ 32. *Plea to a Suggestion.* (c)

SUPREME COURT.

<i>C. D.</i>	}
ads.	
<i>A. B.</i>	

And the said *C. D.*, by *G. H.*, his attorney, comes and defends the wrong and injury when, &c. and says that he did not undertake or promise in manner and form as the said *A. B.* hath above in his said suggestion in that behalf alleged against him; and of this he the said *C. D.* puts himself upon the country, &c.: And the said *A. B.* doth the like.

*G. H.*, Attorney for Defendant.

§ 33. *Judgment for the Plaintiff on a Verdict in ASSUMPSIT, upon a Suggestion; to be entered on, or attached to the Record.* (d)

[*Copy the Suggestion and Plea, and other Pleadings, if there be any, with Imparances, &c. as in other Cases; and then proceed as follows:*] Therefore the issue above joined, is Ordered by the said Supreme Court, to be tried at the Circuit Court appointed to be held at the Court-House in the . . . of . . . ., in and for the county of . . . . aforesaid, [or, if in the City of New-York, "at the Circuit Court, (or, "sittings," appointed to be held at the City-Hall, in and for the said city and county of New-York,"] on the . . . . day of . . . . next.

And now at this day, to wit, the . . . . day of . . . . in the year of

(a) Vide, "Revised Statutes," Part 2, Chap. 5, Tit. 1, §§ 44 & 45 (Vol. 2, p. 310.)

(b) Vide, "Revised Statutes," Part 2, Chap. 5, Tit. 1, §§ 48 & 50, (Vol. 2, p. 311.)

(c) Vide, "Revised Statutes," Part 2, Chap. 5, Tit. 1, § 46, (Vol. 2, p. 310.)

(d) Vide, "Revised Statutes," Part 2, Chap. 5, Tit. 1, §§ 44, 46, 47 & 53, (Vol. 2, pp. 310 & 311.)

our Lord one thousand eight hundred and . . . , before the said Justices of the Supreme Court of Judicature aforesaid, at the . . . in the . . . of . . . , comes the said *A. B.*, by his Attorney aforesaid; and the said Chief Justice, [*or*, "Justice," *or*, "Circuit Judge,"] before whom the said issue was tried, hath sent hither his record, had before him, in these words, to wit: Afterwards, that is to say, on the day, and at the place within contained, before JOHN SAVAGE, Esquire, Chief Justice, [*or*, "before *J. S.*, Esquire, one of the Justices,"] of the Supreme Court of Judicature of the People of the State of New-York, [*or*, "before *J. E.* Esquire, one of the said Circuit Judges,"] within mentioned, according to the form of the Statute in such case made and provided, come as well the within named *A. B.* as the within named *C. D.*, by their respective Attorneys within mentioned; and the jurors of the jury whereof mention is within made, being summoned, also come, who to speak the truth of the matters within contained, being chosen, tried, and sworn, say upon their oath, that the said *C. D.* did undertake and promise in manner and form as the said *A. B.* hath within suggested against him; and they assess the damages of the said *A. B.*, on occasion of the premises, besides his costs and charges by him about his suit in this behalf expended, to . . . dollars, and for those costs and charges to . . . dollars.

Judgment signed,  
&c. [as in § 20.]

*Therefore, it is considered, that the said A. B. do recover against the said C. D. his said damages, costs and charges, by the jurors aforesaid, in form aforesaid assessed, and also . . . dollars, for his said costs and charges, by the said Supreme Court, before the aforesaid Justices thereof, now here, adjudged of increase to the said A. B. and with his assent; which said damages, costs and charges in the whole amount to . . . dollars. And the said C. D., in mercy, &c.*

The existing Statutory Provisions in the State of *New-York*, in relation to the Action of Ejectment, and to the right of Tenants in possession to *compel* the institution of Suits in Ejectment against themselves, for the purpose of settling the Title, will be found in the following extracts from Part 3 Chap. 5 of the "*Revised Statutes*" (*Vol. 2, pp. 302 to 315.*)

## " TITLE I.

### OF THE ACTION OF EJECTMENT.

- S<sup>EC</sup>. 1. Action retained in the cases in which it is now allowed.
2. Other cases in which it may be brought.
3. Who to be plaintiffs in the action.
4. Who to be defendants.
5. How commenced; real claimants to be plaintiffs.
6. Fictitious parties, demises, &c abolished.

7. Contents of declaration.
8. Premises claimed how to be described.
9. Undivided shares when claimed to be stated.
10. Interest of plaintiff to be stated.
11. Several counts and several plaintiffs may be joined.
12. Notice to be subjoined to declaration ; its contents.
13. Declaration, &c. how served, when premises are occupied.
14. How served if premises are not occupied.
15. When special order of court necessary for rule to plead.
16. Rule to appear and plead, when and how entered, &c.
17. Application that attorney for plaintiff produce his authority, allowed.
18. Affidavit necessary, to found application.
19. Order of court or officer, upon application.
20. What to be evidence of such authority.
21. When application to be dismissed and defendant to pay costs.
22. & 23. Pleadings by defendant, appearance, &c. evidence under plea.
24. Consent rules abolished.
25. Right to possession sufficient without actual entry, &c.
26. Leases, entry and ouster not to be proved or confessed.
27. Ouster to be proved in actions by joint tenants, &c.
28. Verdict against all defendants having joint possession.
29. Proceedings when distinct parcels are separately occupied.
30. Verdict how to be rendered in certain cases.
31. Proceedings when plaintiff's title expires before trial.
32. Not to be abated by death of parties in certain cases.
33. Form of judgment upon verdict and by default.
34. Form of writ of possession upon judgment.
35. Costs how collected on judgment against plaintiff.
- 36 & 37. Judgments on verdicts to be conclusive ; but two new trials may be granted.
38. Effect of judgment by default ; new trial thereon.
39. Exceptions of persons under certain disabilities.
40. Exception in case of death of such persons.
41. Possession how affected by recovery on new trial.
42. Rights of defendant on new trial.
43. Plaintiff recovering, to recover damages.
44. Mode of recovering such damages, by suggestion on the record.
45. Form thereof, service and proceedings.
46. Plea and defence of defendant.
47. Trial of issues and assessment of damages.
48. Facts to be established by plaintiff.
49. Set-off allowed of improvements, &c. by defendant.
50. Plaintiff not to recover for more than six years' use.
51. Mode of assessing damages on default, &c.
52. Proceedings to ascertain them.
53. Judgment on verdict or inquisition ; its effect.
54. Proceedings to recover mesne profits, on death of plaintiff.
55. On recovery of dower, proceedings to ascertain it.
56. Costs of admeasurement, how paid.
57. Mortgagees not to maintain ejectment.

**Ejectment retained.**

"SECTION 1. The action of ejectment is retained, and may be brought in the cases and the manner heretofore accustomed, subject to the provisions herein after contained.

"§ 2. It may also be brought,

"1. In the same cases in which a writ of right may now be brought by law, to recover lands, tenements or hereditaments; and by any person claiming an estate therein, in fee or for life, either as heir, devisee or purchaser: And extended to other cases.

"2. By any widow entitled to dower, or by a woman so entitled and her husband, after the expiration of six months from the time her right accrued, to recover her dower, of any lands, tenements or hereditaments. Dower.

"§ 3. No person can recover in ejectment, unless he has at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial. Who to be plaintiffs.

"§ 4. If the premises for which the action is brought, are actually occupied by any person, such actual occupant shall be named defendant in the declaration; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit. Who to be defendant.

"§ 5. It shall be commenced by the service of a declaration, in which the names of the real claimants shall be inserted as plaintiffs, and all the provisions of law concerning lessors of a plaintiff, shall apply to such plaintiffs. How commenced, &c.

"§ 6. The use of fictitious names of plaintiffs or defendants, and of the names of any other than the real claimants and the real defendants, and the statement of any lease or demise to the plaintiff, and of an ejectment by a casual or nominal ejector, are hereby abolished. Fictitious parties, demises, &c. abolished.

"§ 7. It shall be sufficient for the plaintiff to aver in his declaration, that on some day therein to be specified, and which shall be after his title accrued, he was possessed of the premises in question, describing them as herein after provided, and being so possessed thereof, that the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage, any nominal sum the plaintiff shall think proper to state. Contents of declaration.

"§ 8. In such declaration, the premises claimed, shall be described with convenient certainty, designating the number of the lot or township, if any, in which they shall be situated; if none, stating the names of the last occupants of lands adjoining the same, if any; if there be none, stating the natural boundaries, if any; and if none, describing such premises by metes and bounds; or in some other way, so that from such description, possession of the premises claimed, may be delivered. Description of premises claimed.



**Undivided shares.** "§ 9. If such plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in such declaration.

**Estate of plaintiff.** "§ 10. If the action be brought for the recovery of dower, the declaration shall state that the plaintiff was possessed of the one undivided third part of the premises, as her reasonable dower as widow of her husband, naming him. In every other case, the plaintiff shall state whether he claims in fee, or whether he claims for his own life, or the life of another, or for a term of years, specifying such lives or the duration of such term.

**Several counts and plaintiffs.** "§ 11. In any case other than where the action shall be brought for the recovery of dower, the declaration may contain several counts, and several parties may be named as plaintiffs, jointly, in one count, and separately, in others.

**Notice with declaration.** "§ 12. To such declaration there shall be subjoined a notice in writing by the plaintiff or his attorney, addressed to the defendant, and notifying him,

"1. That the said declaration will be filed on some day in the then next term of the court in which the action is brought, specifying such day, or if the same be served during the term of any court, that it will be filed on some day in such term, specifying the same :

"2. That upon filing the same, a rule will be entered, requiring such defendant to appear and plead to such declaration, within twenty days after the entry of such rule : and,

"3. That if he neglect so to appear and plead, a judgment by default will be entered against him, and the plaintiff will recover possession of such premises.

**Service of declarations, &c.** "§ 13. If the premises are actually occupied, the declaration shall be served by delivering a copy thereof, with the notice above prescribed, to the defendant named therein, who shall be in the occupation thereof, personally, or by leaving the same with some person of proper age at the dwelling-house of such defendant, if he be absent.

**1b.** "§ 14. If the premises claimed are not actually occupied, the declaration and notice shall be served on the defendant named therein, personally, or if he cannot be found, by leaving the same with some person of proper age, at the residence of such defendant.

**Special order of court, when necessary.** "§ 15. But where the declaration shall have been served in any other manner than upon the defendant, personally, no rule to plead shall be entered, without the special order of the court.

**When and how to enter rule to plead, &c.** "§ 16. Instead of the rule to appear and enter into the consent rule, as heretofore accustomed, the plaintiff, on the day specified for that purpose in the notice aforesaid, or on some

other day thereafter, upon filing the declaration, with an affidavit of the due service of a copy thereof, and of the notice herein before required, shall be entitled to enter a rule requiring the defendant to appear and plead, within twenty days after the entering of such rule; and in case the defendant shall neglect so to appear and plead within such time, his default shall be entered.

"§ 17. A defendant in ejectment, may, at any time before pleading, apply to the court, or to any judge thereof in vacation, to compel the attorney for the plaintiff to produce to such court or officer, his authority for commencing the action in the name of any plaintiff therein. Authority of plaintiff's attorney.

"§ 18. Such application shall be accompanied by an affidavit of the defendant, that he has not been served with proof in any way, of the authority of the attorney to use the names of the plaintiffs stated in the declaration. Affidavit to be made.

"§ 19. Upon such application, the court or officer shall grant an order requiring the production of such authority, and shall stay all proceedings in the action, until the same be produced. Order on application.

"§ 20. Any written request of such plaintiff or his agent, to commence such action, or any written recognition of the authority of the attorney to commence the same, duly proved by the affidavit of such attorney or other competent witness, shall be sufficient presumptive evidence of such authority. Evidence of authority.

"§ 21. If it shall appear, that previous to such application by any defendant, he was served with a copy of the affidavit of the plaintiff's attorney, showing his authority to bring such action, such application shall be dismissed, and such defendant shall be liable for the costs of resisting such application; the payment of which may be compelled by attachment as in other cases, which may be issued upon proof of disobedience to the order of the court or officer directing the payment of such costs. Application when to be dismissed, &c.

"§ 22. The defendant may demur to the declaration as in personal actions; or he shall plead the general issue only, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in the declaration; and the filing and service of such plea or demurrer, shall be deemed an appearance in the cause. And upon such plea, the defendant may give the same matter in evidence, and the same proceedings shall be had, as upon the plea of not guilty in the present action of ejectment, except as herein otherwise provided. Pleadings, appearance, proceedings. Evidence under plea.

"§ 23. Upon such plea, the defendant may give in evidence any matter which if pleaded in the present writ of right or action of dower, would bar the action of the plaintiff. Ib.

Consent  
rule abol-  
ished.

"§ 24. The consent rule, heretofore used, is hereby abolished.

Right to  
possession  
sufficient,  
&c.

"§ 25. It shall not be necessary for the plaintiff to prove an actual entry under title, nor the actual receipt of any profits of the premises demanded; but it shall be sufficient for him to show a right to the possession of such premises, at the time of the commencement of the suit, as heir, devisee, purchaser or otherwise.

Lease, en-  
try and ou-  
ster, &c.

"§ 26. It shall not be necessary on the trial, for the defendant to confess, nor for the plaintiff to prove, lease, entry and ouster, or either of them, except as provided in the next section; but this section shall not be construed to impair, nor in any way to affect, any of the rules of evidence now in force, in regard to the maintenance and defence of the action.

Ouster to  
be proved  
in certain  
cases.

"§ 27. If the action be brought by one or more tenants in common, or joint tenants, against their co-tenants, the plaintiff, in addition to all other evidence which he may be bound to give, shall be required to prove on the trial of the cause, that the defendant actually ousted such plaintiff, or did some other act amounting to a total denial of his right as such co-tenant.

Verdict up-  
on joint  
possession.

"§ 28. If the action be brought against several defendants, and a joint possession of all be proved, the plaintiff shall be entitled to a verdict against all, whether they shall have pleaded separately or jointly.

Several and  
distinct  
possessions

"§ 29. When the action is against several defendants, if it appear on the trial, that any of them occupy distinct parcels in severalty, or jointly, and that other defendants possess other parcels in severalty, or jointly, the plaintiff shall elect at the trial against which he will proceed; which election shall be made before the testimony in the cause shall be deemed closed; and a verdict shall thereupon be rendered for the defendants not so proceeded against.

Verdict in  
certain ca-  
ses.

§ 30. In the following cases, the verdict shall be rendered as follows:

When for  
all the  
plaintiffs.

"1. If it be shown on the trial, that all the plaintiffs have a right to recover the possession of the premises, the verdict in that respect shall be for the plaintiffs generally:

When for  
one or  
more of  
them.

"2. If it appear that one or more of the plaintiffs have a right to the possession of the premises, and that one or more have not such right, the verdict shall specify for which plaintiff the jury find, and as to which plaintiff they find for the defendant.

Against  
what de-  
fendant

"3. If the verdict be for any plaintiff, and there be several defendants, the verdict shall be rendered against such of them as were in possession of the premises, or as claimed title thereto, at the commencement of the action:

When to be  
general.

"4. If the verdict be for all the premises claimed, as specified in the declaration, it shall in that respect be for such premises generally:

"5. If the verdict be for a part of the premises described in such declaration, the verdict shall particularly specify such part, as the same shall have been proved with the same certainty herein before required in the declaration, in the description of the premises claimed : When to be for part of premises.

6. If the verdict be for an undivided share or interest in the premises claimed, it shall specify such share or interest ; and if for an undivided share in a part of the premises claimed, it shall specify such share, and shall describe such part of the premises as herein before required : Undivided shares.

7. The verdict shall also specify the estate which shall have been established on the trial, by the plaintiff in whose favor it shall be rendered, whether such estate be in fee, for his own life, or for the life of another, stating such lives, or whether it be a term of years, and specifying the duration of such term. Nature of plaintiff's estate.

"§ 31. If the right or title of the plaintiff in ejectment expire after the commencement of the suit, but before trial, the verdict shall be returned according to the fact, and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed ; and that as to the premises claimed, the defendant go thereof without day. Expiration of plaintiff's title before trial.

"§ 32. The action of ejectment shall not be abated by the death of any plaintiff, or of one of several defendants, after issue and before verdict or judgment ; but the same proceedings may be had as in other actions, to substitute the names of those who may succeed to the title of the plaintiff so dying, in which case, the issue shall be tried as between the original parties ; and in case of the death of a defendant, the cause shall proceed against the other defendants. Abatement of suit by death.

"§ 33. In cases where no other provision is made, the judgment in the action, if the plaintiff prevail, shall be, that the plaintiff recover the possession of the premises, according to the verdict of the jury, if there was such verdict ; or if the judgment be by default, according to the description thereof in the declaration, with costs to be taxed. Form of judgment.

"§ 34. The plaintiff recovering judgment, shall be entitled to writ of possession which shall be substantially, in the following form : Form of writ of possession.

"The People, &c. To the Sheriff, &c.

Where as A. B. has lately, in our supreme court of judicature, [or, 'in the court of common pleas held in and for the county of \_\_\_\_\_,' as the case may be,] by the judgment of the said court, recovered against C. D. one messuage, &c. [describing the premises recovered, with the like certainty as above provided,] which said premises have been, and are still unjustly withheld from the said A. B. by the said C. D. whereof he is con-

victed, as appears to us of record ; and forasmuch as it is adjudged in the said court that the said A. B. have execution upon his said judgment against the said C. D., according to the force, form and effect of his said recovery ; therefore we command you, that without delay, you deliver to the said A. B. possession of the said premises so recovered with the appurtenances ; and that you certify to, &c. at, &c. on, &c. in what manner you shall have executed this writ. [If there be costs to be collected, the proper clause may be here inserted, or a separate execution may be issued therefor.]

"Witness, &c."

Costs how collected of plaintiff.

"§ 35. Upon a judgment against the plaintiff, or one or more plaintiffs, in cases where they shall be liable for costs, execution for the collection of the same, shall be issued as upon judgments in personal actions ; and the proceeding by attachment for the collection of such costs, is hereby abolished.

Effect of judgment on verdict.

"§ 36. Every judgment in the action of ejectment, rendered upon a verdict, shall be conclusive as to the title established in such action, upon the party against whom the same is rendered, and against all persons claiming from, through or under such party, by title accruing after the commencement of such action, subject to the exceptions hereinafter contained.

New trials how granted.

"§ 37. The court in which such judgment shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs or assigns, and upon payment of all costs and damages recovered thereby, shall vacate such judgment and grant a new trial in such cause. And the court upon subsequent application made within two years after the rendering of the second judgment in said cause, if satisfied that justice will be thereby promoted, and the rights of the parties more satisfactorily ascertained and established, may vacate the judgment and grant another new trial. But no more than two new trials shall be granted under this section.

Effect of judgment by default.

"§ 38. Every judgment in ejectment rendered by default, shall, from and after three years from the time of docketing the same, be conclusive upon the defendant, and upon all persons claiming from or through him by title accruing after the commencement of the action. But within five years after the docketing of such judgment, on the application of the defendant, his heirs or assigns, and upon payment of all costs and damages recovered thereby, the court may vacate such judgment and grant a new trial, if such court shall be satisfied that justice will be promoted, and the rights of the parties more satisfactorily ascertained and established.

New trial.

Exception to last section.

"§ 39. But if the defendant in such action, at the time of the docketing of the judgment by default, be either,

"1. Within the age of twenty-one years : or,

" 2. Insane : or,

" 3. Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence, for any term less than for life : or,

" 4. A married woman :

" The time during which such disability shall continue, shall not be deemed any portion of the said three years ; but any such person may bring an action for the recovery of such premises after that time, and within three years after such disability shall be removed, but not after that period.

" § 40. If the person entitled to commence such action, shall die during the continuance of any disability specified in the preceding section, and no determination or judgment be had of or upon the title, right or action so to him accrued, his heirs may commence such action, after the time above limited for that purpose, and within three years after his death.

" § 41. If the plaintiff shall have taken possession of the premises, by virtue of any recovery in ejectment, such possession shall not in any way be affected by the vacating of any judgment, as herein provided ; and if the defendant recover in any new trial hereby authorised, he shall be entitled to a writ of possession, in the same manner as if he was plaintiff. Possession after recovery on new trial.

" § 42. Upon any new trial granted as herein provided, the defendant may show any matters in bar of a recovery, which he might show to entitle him to the possession of the premises, if he were plaintiff in the action. Evidence on new trial.

" § 43. The plaintiff recovering judgment in ejectment in any of the cases in which such action may be maintained, shall also be entitled to recover damages against the defendant for the rents and profits of the premises recovered. But if such action be brought for the recovery of the dower, the plaintiff shall be entitled to recover such damages, only in the cases and to the extent prescribed in the First Chapter of the Second Part of the Revised Statutes. Damages to be recovered.

" § 44. Instead of the action of trespass for *mesne* profits heretofore used, the plaintiff seeking to recover such damages, shall, within one year after the docketing of the judgment, make and file a suggestion of such claim ; which shall be entered with the proceedings thereon, upon the record of such judgment, or be attached thereto, as a continuation of the same. Mode of recovery ; suggestion.

" § 45. Such suggestion shall be substantially in the same form as is now in use for a declaration in an action of assumpsit for use and occupation, as near as may be ; and it shall be served on the defendant in the same manner herein before prescribed respecting the service of a declaration in ejectment ; and a rule to plead thereto shall be entered, and notice thereof given, in the same manner as upon declarations in personal actions. Form of, &c.

**Plea and defence.**

“§ 46. The defendant may plead the general issue of non-assumpsit, and under such plea, may give notice of, or may plead specially, any matters in bar of such claim, except such as were or might have been controverted in such action of ejectment; but he may plead or give notice of a recovery by such defendant, or any other person, of the same premises, or of part thereof, subsequent to the verdict in such action of ejectment, in bar or in mitigation of the damages claimed by the plaintiff.

**Trial of issues, &c.**

“§ 47. If any issue of fact be joined on such suggestion, it shall be tried, as in other cases; and if such issue be found for the plaintiff, the same jury shall assess his damages, to the amount of the *mesne* profits received by the defendant since he entered into possession of the premises, subject to the restrictions herein after contained.

**Facts to be established by plaintiff.**

“§ 48. On the trial of such issue, the plaintiff shall be required to establish, and the defendant may controvert, the time when such defendant entered into the possession of the premises; the time during which he enjoyed the *mesne* profits thereof; and the value of such profits; and the record of the recovery in the action of ejectment, shall not be evidence of such time.

**Set-off by defendant.**

“§ 49. On such trial the defendant shall have the same right to set off permanent improvements made on the premises, to the amount of the plaintiff's claim, as is now allowed by law. And in estimating the plaintiff's damages, the value of the use by the defendant of any improvements made by him, shall not be allowed to the plaintiff.

**Extent of recovery.**

“§ 50. The plaintiff shall not be entitled to recover the rents and profits of the land so recovered, for any longer term than six years.

**Assessing damages on default, &c.**

“§ 51. If no issue of fact be joined on such suggestion, or if judgment thereon be rendered against the defendant by default, on demurrer or otherwise, a writ of inquiry, to assess the value of such *mesne* profits, shall be issued, of the execution of which, the same notice shall be given to the defendant, or his attorney, as in other cases.

**Proceedings.**

“§ 52. Upon the execution of such writ, the plaintiff shall be required to establish the same matters herein before required, in the case of an issue being joined, and the defendant may, in like manner, controvert the same, and make any set-off to which he shall be entitled; and the jury shall assess the damages in the same manner. The same proceedings shall be had on such writ, and it shall be returned, as in other cases, with the inquisition taken thereon.

**Judgment.**

“§ 53. Upon such inquisition, or upon the verdict of the jury in the case of an issue being joined, the court shall render

judgment as in actions of assumpsit for use and occupation, which shall have the like effect in all respects.

"§ 54. If the plaintiff in ejectment shall have died after issue joined or judgment therein, his personal representatives may enter a suggestion of such death, of the granting letters testamentary or of administration to them, and may suggest their claim to the *mesne* profits of the premises recovered, in the same manner and with the like effect, as the deceased; and the same proceedings, in all respects shall be had thereon. Proceedings on death of plaintiff.

"§ 55. If the action be brought to recover the dower of any widow, which shall not have been admeasured to her before the commencement of such action, instead of a writ of possession being issued, such plaintiff shall proceed to have her dower assigned to her in manner following: lib. on recovery of dower.

"1. Upon the filing of the record of judgment, the court, upon the motion of the plaintiff, shall appoint three reputable and disinterested freeholders, commissioners, for the purpose of making admeasurement of the dower of the plaintiff, out of the lands described in the record; and the commissioners so appointed, shall proceed in like manner, possess the like powers and be subject to the like obligations and control, as commissioners appointed pursuant to the seventh Title of the eighth Chapter of this act: Commissioners to be appointed, &c.

"2. The report of the commissioners may be appealed from by any party to the action, within the same time, and the like proceedings shall be had thereupon, as are prescribed in the said seventh Title of the said eighth Chapter: Proceedings on their report.

"3. Upon the confirmation of the report of the commissioners, a writ of possession shall be issued to the sheriff of the proper county, describing the premises assigned for the dower, and commanding the sheriff to put the defendant in possession thereof. Writ of possession.

"§ 56. The costs and expenses incurred in such admeasurement of dower, shall be subject to the provisions contained in the seventh Title of the eighth Chapter of this act. Costs.

"§ 57. No action of ejectment shall hereafter be maintained by a mortgagee, or his assigns or representatives, for the recovery of the possession of the mortgaged premises." Ejectment by mortgagees.

The following provisions are peculiar to Actions of Ejectment commenced on behalf of the State.

"*Revised Statutes,*" Part 1, Chap. 8, Tit. 5, §§ 10, 11 & 12, (Vol. 1, pp. 180, 181.)

"§ 10. Every action of ejectment already commenced, or hereafter to be commenced, in the name of the people of this state, either by the attorney-general, or with his consent, shall and may be sustained and prosecuted to judgment and execu- Ejectments brought by him.



tion, in the supreme court of this state, in like manner as if such action had been commenced by an individual; but no such suit shall be commenced for the benefit of an individual, without the consent of the attorney-general.

**Ib.** "§ 11. No such consent shall be given by the attorney-general, unless the individual desirous to prosecute such suit, shall give security to the defendant for the payment of the taxable costs, in case the suit shall be determined in favor of the defendant. The security shall be filed in the office of one of the clerks of the supreme court, and be approved of by the clerk in whose office it shall be filed.

**Ib.** "§ 12. Whenever an action of ejectment shall be brought for the purpose of escheating lands, or otherwise, for the benefit of the people of this state, by the attorney-general, or by the direction of the commissioners of the land-office, and the nominal plaintiff shall fail therein for any cause, or the action shall be discontinued, the defendant shall be entitled to costs in the same manner, and to the same extent, as if such action had been brought by an individual; which costs, upon being duly taxed, shall be paid out of the treasury of this state, on the warrant of the comptroller."

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"*Revised Statutes*," Part 1, Chap. 9, Title 12. (*Vol. 1, pp. 282, 283*.) as amended by Act of 53d Session, Chap. 320. (*Laws of 1830, pp. 402, 403.*)

## TITLE XII.

### OF ESCHEATS.

**Sec. 1.** Attorney-general to bring ejectment for the recovery of escheated lands:

2. Notice of such suits, how published.

3. Contents of such notice.

4. Special provisions as to place of trial.

5. When part of a lot is escheated residue may be sold.

6. Effect of grants in such cases.

7. Residue to be appraised, &c.

8. Attorney-general to report recoveries to the commissioners of the land-office.

Ejectment  
to be  
brought.

"§ 1. Whenever the attorney-general shall be informed, or have reason to suspect, that the people of this state have title to any real estate by escheat, he shall cause an action of ejectment to be brought for the recovery thereof, in which action the proceedings shall, in all respects, be similar to those usually had in other actions of ejectment,<sup>93</sup> except that where the premises for which the action is brought are not occupied by

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(93) *Laws of 1818, p. 293, § 2; 1820, p. 248, § 5.*

any person, and no person shall be known as claiming title thereto, the supreme court, on affidavit of such facts, may allow the suit to be brought as against claimants unknown; and the declaration and notice shall be served by publishing the same in such manner and for such time as the court shall direct; and if no person shall appear in the said action, the default of the claimants unknown shall be entered, and judgment be rendered thereon.'

"§ 2. No such action shall be brought to trial, when the lands are occupied, nor shall judgment be taken therein, when such lands are vacant, until three months' notice shall have been published, by order of the commissioners of the land-office, in the state paper, and also in one public newspaper printed in the city of New-York, and in one paper printed in the county where the lands shall be situated, or in an adjoining county, when there is no paper printed in the county.<sup>93</sup> Notice to be published.

"§ 3. Such notice shall state the proceedings which have been had, for the recovery of the said lands, and give a description of the same.<sup>94</sup> Contents.

"§ 4. After any lands recovered in any action against claimants unknown, shall have been sold and conveyed under the direction of the commissioners of the land-office, the judgment recovered in such action shall be conclusive upon the title of such lands, and shall bar all persons claiming or to claim the same or any part thereof; except such claimants as shall, within five years after the docketing of such judgment, commence their action for the recovery of such lands, subject to the like exceptions in favor of persons within age, insane or imprisoned, and of married women, as are contained in the statutes of this state, regulating the time of commencing actions relating to real property.

"§ 5. Any such action of ejectment, which has been, or may hereafter be commenced, to recover any lands situated in the military tract, in the several counties of Cortland, Tompkins, Seneca and Oswego, may be tried in either of the counties of Onondaga or Cayuga, whenever the attorney-general, and the attorney for any defendant, shall agree thereto, in writing, which agreement shall be filed in the office of one of the clerks of the supreme court; and every trial of any such action, pursuant to such agreement, shall have the like effect and validity as if such trial were had in the county where such lands are situated.<sup>94</sup> Suit, when tried in certain cases.

"§ 6. In all cases where proceedings have been or shall hereafter be had, whereby any part of any lot on the tract set apart for military bounty lands, have been or shall be, by judgment of law, escheated to the people of this state, on account of the death of the original patentee, without heirs, and before Effect of escheat of part of a lot.

(93) Laws of 1818, p. 293, § 2; 1820, p. 248, § 5. (94) Laws of 1820, p. 249, § 8.

a conveyance by such patentee, or for any other cause, which shall in like manner extend to the title of the whole of such lot, the whole and every part of such lot included in the original patent of the same, and which, at the time of such escheat, was not in the actual possession of any person or persons under colour of title, may be sold by the commissioners of the land-office, and granted in the manner provided by law for the sale of the unappropriated lands belonging to this state.<sup>95</sup>

Grants  
thereof.

“§ 7. Any such grant shall be presumptive evidence of the title of the people of this state, and of the grantee therein named, but may be rebutted by proof that the premises contained in such grant had not in fact escheated to this state.”<sup>95</sup>

Occupants.

“§ 8. Whenever such proceedings shall have been had, as are mentioned in the fifth section of this Title, and a part of a military lot shall have been escheated to the people of this state, for any reason which extends to the title of the whole lot, the commissioners of the land-office may cause the value of the remaining parts of said lot to be appraised as provided in the “Act for the relief of the occupants of military lands which have escheated to the people of this state,” passed April 13th, 1819, and the acts amending the same, notwithstanding the necessary proceedings may not have been had to perfect the title of the people to the same; and the occupants of such parts shall thereupon be entitled to all the privileges and benefits conferred by the said act, and the several acts amending the same.”<sup>95</sup>

Report.

“§ 9. The attorney-general shall, from time to time, make report to the commissioners of the land-office, of all escheated lands recovered by him, in any action of ejectment brought under this Title.”

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“*Revised Statutes*,” Part 1, Chap. 9, Title 13, § 1, (*Vol.* 1, pp. 283, 284.)

### TITLE XIII.

Real estate.

“§ 1. Real estates forfeited to the people of this state, upon any conviction or outlawry for treason, may be recovered in the same manner as escheated lands; and for that purpose, all the provisions of the preceding Title, except those contained in the fourth, fifth, sixth and seventh [and eighth] sections, shall be construed to extend to the recovery of estates so forfeited.”<sup>96</sup>

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(95) Laws of 1822, p. 429, 430. (96) 1 R. L. 362, § 6.

## "TITLE II.

PROCEEDINGS TO COMPEL THE DETERMINATION OF CLAIMS  
TO REAL PROPERTY, IN CERTAIN CASES.

Sac. I. Who entitled to proceed under this Title.

2. Notice to be served on claimant ; its contents.
3. Upon what persons and how to be served.
4. Rule for appearance of claimant, how to be entered.
5. Claimant to appear by serving notice.
6. Judgment for want of appearance, &c. ; its effects.
7. Plea in bar of certain matters ; judgment thereon, &c.
8. Disclaimer of right, costs thereon and effect of.
9. If title claimed, to declare in ejectment.
10. What to be deemed pleading, within the rule.
11. Rule upon filing declaration in ejectment.
12. Pleadings and proceedings thereon.
13. Right of possession not required in certain cases, &c.
14. Effect of judgment in such actions.
15. Writ of possession and mesne profits.
16. Exception as to reversions, &c.
- 17, 18 & 19. Proceedings under this Title against non-residents having agents.
20. In what cases rule to appear and plead, may be had.

" § 1. Where any person, singly, or he and those whose estate he has, shall have been for three years in the actual possession of any lands or tenements, claiming the same in fee or for life, he may compel a determination upon any claim which any other person may make to any estate in fee or for life, in possession, reversion or remainder, to such lands and tenements, in the manner and by the proceedings herein after specified.

Who may proceed.

" § 2. He shall serve a notice, subscribed with his name and place of residence, on such claimant, stating,

Notice to be served; its contents.

" 1. His right to the premises demanded, in a brief manner, and whether his estate therein is in fee or for life, and whether he holds the same as heir, devisee or purchaser, with the source or means by which his right immediately accrued to him :

" 2. The premises claimed, with the same certainty as herein before required in a declaration in ejectment :

" 3. That such premises then are, and for the three years preceding such notice have been, in his actual possession, or in the actual possession of himself and those from whom he derives his title : and,

" 4. That the person to whom such notice is directed, unjustly claims title to such premises, and that unless such person appear in the supreme court within the time, and assert his claim, in the manner provided by law, he and all persons claiming under him, will be forever barred from all claim to any estate of inheritance or freehold, in possession, reversion or remainder, to the premises described in such notice.

**Upon whom and how to be served.** "§ 3. Such notice can be directed to and served, only, upon a person being at the time, of full age and not insane, nor imprisoned on any criminal charge or conviction, and not being a married woman; and it shall be served by delivering a copy thereof personally to the individual to whom it is directed.

**Rule for appearance.** "§ 4. Upon any day in any term of the supreme court after the service of such notice, the person who caused the same to be served, on filing a copy of such notice, with an affidavit of the due service thereof, as herein required, may enter a rule of course, requiring the person on whom such notice was served to appear and plead thereto, within forty days after the entry of such rule.

**How to appear.** "§ 5. Such appearance shall be made by serving notice thereof on the person in whose behalf such rule was entered, or on his attorney.

**Judgment for not appearing, &c.** "§ 6. If such person shall not appear and plead, within the time limited in the rule, the court shall direct his default to be entered, and judgment shall be rendered upon such default, in like manner, and with the like effect, as if such person had appeared and disclaimed, as herein after provided; except that no costs shall be adjudged against either party.

**Certain matters to bar proceedings.** "§ 7. Such person may plead in bar of all further proceedings, that neither the party serving such notice, nor he and those whose estate he has, have been in the actual possession of the premises claimed, for three whole years before the service of such notice. And if judgment be given in favor of such plea, all further proceedings shall be barred, and the person so pleading shall recover his costs. If judgment be given against such plea, the party pleading may be required by rule, to be entered as of course, to plead to the title within twenty days after service of a notice of such rule; and in case he shall omit so to plead within that time, the like judgment shall be had against him as if he had disclaimed, as provided in the next section.

**Disclaimer.** "§ 8. Such person may by plea disclaim all right, title and claim to any estate of inheritance or of freehold in the premises described in the notice, and which shall also be described in such plea; in which case judgment of discontinuance shall be entered with costs, to him; but he and all persons claiming under him, by title accruing subsequently to the service of the notice herein before provided, shall be forever barred from all claim to any estate of inheritance or freehold in the said premises.

**To declare, if title claimed.** "§ 9. If such person claims title, in fee or for life, in possession, reversion or remainder, he shall declare against the person serving such notice, as in an action of ejectment, and shall thereupon become plaintiff in such action.

**Pleading.** "§ 10. Such declaration, or any plea herein before allowed, shall be deemed a pleading within the rule requiring an appearance and plea as herein before provided.

"§ 11. If a declaration in ejectment be filed and served as herein provided, the plaintiff therein may enter a rule requiring the defendant to plead thereto within twenty days after service thereof, in the same manner and with the like effect as in personal actions. Rule on declaration.

"§ 12. Such defendant shall demur or plead thereto in the same manner as herein before provided, and the like proceedings in all respects shall be had, and with the like effect, except as herein otherwise provided. Proceedings thereon.

"§ 13. If such plaintiff claim the premises in question by virtue of any estate in remainder or reversion, he shall not be required to establish an immediate right to the possession of such premises; but if a verdict be found in his favor, the time when he will be entitled to such possession, shall be specified in such verdict. Reversions, &c.

"§ 14. In such action of ejectment, a judgment obtained by either party, shall be conclusive against the other party, as to the title established in such action; and also against all persons claiming under such party by title accruing subsequently to the service of the notice herein before provided. Effect of judgment.

"§ 15. If the plaintiff recover and be entitled to the immediate possession of the premises, he shall be entitled to a writ of possession as herein before provided, and may recover the value of the use and occupation of the premises, by a suggestion on the record, in the same manner as other plaintiffs in ejectment. Writ of possession and means profits.

"§ 16. If such plaintiff recover upon any title in reversion or remainder, by virtue of which he shall not, at the time of such recovery, be entitled to the immediate possession of the premises in controversy, no writ of possession shall issue upon such judgment, nor shall any claim to damages be suggested upon the record; but whenever such plaintiff, or those claiming under him, shall be entitled to such possession, an action of ejectment may be brought for the recovery thereof, as in other cases. Reversions, &c. excepted.

"§ 17. When the person intended to be proceeded against under the provisions of this title, shall not be a resident of this state, and shall not have been personally served with the notice specified in the second section of this title, the party seeking to avail himself of the provisions of this title, may present a petition to the supreme court, setting forth such facts, together with a copy of such notice; which petition, together with the facts stated in such notice, shall be verified by his affidavit. Proceedings against non residents.

"§ 18. Such affidavit shall also set forth, whether the party proceeded against has any agent or agents within this state, and the names and residence of such agents, if any are known.

"§ 19. The court may thereupon, in its discretion, make order for the service of such notice upon such agent or agents.

**Rule there- on.** "§ 20. Upon due proof of the service of such notice in the manner directed, such court, upon the application of the party giving such notice, if no good cause to the contrary appear, and if the parted proceeded against shall not have appeared pursuant to the provisions of this title, may direct a rule to appear and plead, as prescribed in the fourth section of this title; and thereafter such proceedings may be had, and with the like effect, as in other cases."

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Note (A.)

Pages 50 to 60 inclusive, with the notes thereto, shew in what cases, the defence of Adverse possession cannot be sustained: it only remains, therefore, to point out what is necessary to constitute an effectual adverse possession, in cases where it can be set up as a defence. But for a thorough understanding of the subject, a previous knowledge of the object and intent of the Statutes of Limitations, as explained in the Opinions of the Superior Courts of Law and Equity, is essentially necessary. Some of the most important of those Opinions, are therefore, inserted.

"The object of the law, [*the Statute of Limitations*] is to secure the individual from the machinations of dishonesty when attempted under the advantages attendant upon the lapse of time, loss of papers, and death of witnesses. But when cases present themselves in which no laches can be imputed to the plaintiffs, but great injustice would be done by applying to such cases the effect of the Statute, the conclusion of Reason and of the Law is that such cases were not in the mind of the Legislature when enacting the law. Such are the cases of a want of parties, plaintiff or defendant, whereby a temporary suspension of legal remedy takes place. But in no case of a voluntary abandonment of an action, has an exception to the Statute of Limitations been supported." *Richards & others vs. The Maryland Insurance Company*, 8 Cranch's Rep. 92, 93. (Per JOHNSON, J. delivering the Opinion of the Court.)

So in the case of *Robinson vs. Campbell*, (3 Wheat. Rep. 224.) TOMB, J. delivering the Opinion of the Court, said: "The last question is, whether the Statute of Limitation of Tennessee was a good bar to the action. It is admitted, that it would be a good bar only upon supposition that the lands in controversy were always within the limits of Tennessee; but there is no such proof in the cause. The compact of the states [*Virginia and Tennessee*] does not affirm it, and the present boundary was an amicable adjustment by that compact. It cannot, therefore, be affirmed by any Court of Law, that the land was within the reach of the Statute of Limitations of Tennessee until after the compact of 1802. The Statute could not begin to run until it

"was ascertained that the land was within the jurisdictional limits of the state of Tennessee.

The Statute of Limitations is suspended during war, as to alien enemies. *Ogden vs. Blackledge*, 2 *Cranch's Rep.* 272.

A war suspends the operation of the Statute of Limitations between the citizens of the two countries, for the time during which it continues. *Wall, Ads. Robson*, 2 *Nott & M'C. Rep.* 498.

"The Statute of Limitations is intended, not for the punishment of those who neglect to assert their rights by suit, but for the protection of those who have remained in possession under colour of a title believed to be good." *M'Iver & Al. vs. Ragan & Al.* 2 *Wheat. Rep.* 29. (Per MARSHALL, Ch. J. delivering the Opinion of the Court.)

"It must be, as I understand the law, such a title as the law will *"prima facie"* consider a good title." *Jackson ex dem. Ten Eyck & Al. vs. Frost*, 5 *Coven's Rep.* 351. (Per SAVAGE, Ch. J. delivering the Opinion of the Court.) & *Vide Francoise vs. De La Ronde*, 8 *Martin's Rep.* 619. *Bonne & Al. vs. Powers*, 3 *Martin's Rep. (N. S.)* 458.

"Statutes of Limitations relate to the remedies which are furnished in the Courts. They rather establish, that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance." *Sturges vs. Crowninshield*, 4 *Wheat. Rep.* 207. (Per MARSHALL, Ch. J. delivering the Opinion of the Court.)

"Every Statute of Limitations, being in restraint of right, must be construed strictly." *Pease vs. Howard*, 14 *Johns. Rep.* 480. (Per VAN NESS, J. delivering the Opinion of the Court.)

To constitute a valid and effectual adverse possession, it is necessary.

1st, *That it be commenced under Colour and Claim of Title :*

"To constitute an adverse possession, there must be possession under colour and claim of title."—"It has never been considered as necessary to constitute an adverse possession, that there should be a rightful title." *Smith ex dem. Teller & Al. vs. Burtis & Al.* 9 *Johns. Rep.* 179, 180. SAME POINT, *Jackson ex dem. Roosevelt vs. Wheat.*, 18 *Johns. Rep.* 40. *Jackson ex dem. Vanderlyn & Belts vs. Newton & Al.*, 18 *Johns. Rep.* 355. *Jackson ex dem. Gansvoort & Al. vs. Parker*, 3 *Johns. Cas.* 124. *Jackson ex dem. Young & Al. vs. Ellis & Al.* 13 *Johns. Rep.* 118. *Jackson ex dem. Swartout & Uz vs. Johnson*, 5 *Cow. Rep.* 92. *Jackson ex dem. Ten Eyck & Al. vs. Frost*, 5 *Cow. Rep.* 350. *Jackson ex dem. Young & Al. vs. Camp*, 1 *Cow. Rep.* 609. *Jackson ex dem. Gilliland & Al. vs. Woodruff & Al.*, 1 *Cow. Rep.* 285. & *Vide Seymour vs. DeLancey & Al.*, 1 *Hopk. Rep.* 448. *Jackson ex dem. Gansvoort & Al. vs. Lunn*, 3 *Johns. Cas.* 115, 117. *Jackson ex dem. Hasbrouck vs. Vermilyea*, 6 *Cow. Rep.* 680.

"Seven years possession without a colour of title, is not sufficient to bar the plaintiff in ejectment. *Stanley vs. Turner*, *Cam. & Nbrw. Rep.*



545. *SAME CASE*, 2 *Hayw. Rep.* 336. & *Vide Anonymous Case*, 2 *Hayw. Rep.* 134. *Den ex dem. Jones vs. Ridley*, 2 *N. Car. Law. Rep.* 399. *Den ex dem. Stanley vs. Turner*, 1 *Murph. Rep.* 14. *Den ex dem. Midford & Uz. vs. Hardison*, 3 *Murph. Rep.* 166.

"Adverse possession, is a possession under colour and claim of title." 9 *Johns. Rep.* 179, 180." *Rogers vs. Hillhouse*, 3 *Connect. Rep.* 403.

"The Act of Limitations ripens no possession into title, which is unaccompanied with a colour of title." *Borrets vs. Turner*, 2 *Hayw. Rep.* 114. — vs. *Ash*, *Ibid.* 104. *Armour vs. White*, *Ibid.* 69. *Grant vs. Winborne*, *Ibid.* 57. *Anonymous*, *Ibid.* 134. & *Vide Patton's Lessee vs. Eason*, 1 *Wheat. Rep.* 480. *Tasker's Lessee vs. Whittington*, 1 *Har. & M'Hen. Rep.* 151. *Hatch vs. Hatch*, 2 *Hayw. Rep.* 34.

In the case of *Innis vs. Miller & Al.* (10 *Martin's Rep.* 298.) The defendant set up a title by prescription, and to make out the requisite length of time attempted to connect their possession with that of their predecessor, but THE COURT said; "Three things must concur, in order that they may unite the possession of their predecessor to their own: — 1. He must have possessed in good faith and under colour of title. 2. It must be continued, and without interruption. 3. It must be that which the possessor had at the moment of the tradition. The defendants have failed to bring themselves within either of those rules."

An individual put in possession by the Spanish Government, by metes and bounds, of a part of the King's land, as her own, acquired such title, which strengthened by long possession must prevail. *Sanchez & Wife vs. Gonzales*, 11 *Martin's Rep.* 207.

In the case of *Bloss vs. —*, decided October Term, 1802, (2 *Hayw. Rep.* 223,) JOHNSON, J. said; "Seven years possession without a colour of title, will bar the plaintiff's right to an ejectment." But the reporter adds the following note: "*Quære*, as to the seven years naked possession being a bar to the plaintiff; for it is not law as the Court of Conference has since decided." *Vide Stanley vs. Turner*, (decided June Term, 1804,) *Cam. & Norw. Rep.* 545. *SAME CASE*, (December, 1804,) 2 *Hayw. Rep.* 336.

In the case of *Somerville vs. Hamilton*, (4 *Wheat. Rep.* 233,) where a party had been in possession more than seven years under claim of title, (Per STORY, J. delivering the Opinion of the Court,) said; "A possession for such a length of time, under title, was, by the Statute of Limitations of North Carolina, a conclusive bar against any suit by any adverse claimant, unless he was within some one of the exceptions or disabilities provided for by that Statutes."

Under the Statute of Limitations of Tennessee of 1797, c. 43. s. 4. peaceable and uninterrupted possession, claiming to hold the land adverse to the claims of all other persons, for seven years, under a grant or deed of conveyance founded on a grant, gives a complete title to the person who has the possession. *Piles & Al. vs. Bauldin & Al.* 11 *Wheat. Rep.* 325.

A devise is colour of title, and seven years possession under it bars the right of entry. *Den ex dem. Evans vs. Satterfield*, 1 *Murph. Rep.* 413.

Although it is well settled in the State of New-York, and in most of the other States of the Union, that a possession, to be adverse to the true owner, must be *under Colour and Claim of Title*; yet a contrary opinion seems to be held in some few of the States; and, in one instance, at least, the question was left undecided.

In the case of the *Lessee of Potts vs. Gilbert*, decided in the District Court of the United States for the District of Pennsylvania in the third Circuit, (1 *Hall's Journal of Jurisprudence*, 256,) WASHINGTON, Judge, in his *Charge to the Jury*, said; "Whether to support the possession of a person who enters without title upon a piece of land, who encloses, improves and cultivates it, and continues the same peaceably for the space of twenty-one years, it is incumbent upon him to show that such possession was taken and continued under a claim or colour of title, is a question of great importance, and in my opinion, of no small difficulty. The affirmative of this question seems to be maintained by the learned Judges of New-York, and that opinion is therefore entitled to our highest respect. My own mind is not decided upon this point, and as it is not material to the decision of this case, I shall express no opinion upon it."

In *Anderson vs. Gilbert*, (1 *Bay's Rep.* 375, 376.) BAY, J. Held, "That wherever a party intended to rely on possession for title, it was necessary either to prove payment of a consideration, or other colour of a title; because it was *occupancy alone* that the law regarded, as a sufficient title in such cases." & *Vide Strange vs. Durham* 3 *Bay's Rep.* 429.

In *Gay vs. Moffit*, (2 *Bibb's Rep.* 206.) which was an action of ejectment, Judge LOGAN, who delivered the *Opinion of the Court*, said; "It will be admitted, that a mere *naked possession* for twenty years will in general bar this action. But a right thus derived must be founded on an *adverse possession*."

And in the case of *Den ex dem. Van Wickle vs. Alpough*, (2 *Penn. Rep.* 452.) PENNINGTON, J. said; "Whether *Fairly* went into possession under an equitable title, or under no title at all, is in my view of the subject immaterial, if he held as his own and denied the right of John-son."

And this seems *formerly* to have been the doctrine in Connecticut; for in the case of *Troubridge vs. Royce*, (1 *Root's Rep.* 50.) where it appeared upon the evidence, that "the plaintiff's ancestor more than fifteen years before the commencement of the suit, gave the defendant licence to build a shop upon this plot of ground, without any consideration, and to use and improve it without any limitation as to time, or reserving any rent, that the defendant accordingly built a shop on said ground, and had continued to use, improve, and enjoy it as his own without any claim or molestation from any person for more than fifteen

years, &c. Verdict and judgment for the defendant." & *Vide Lane vs. Copley*, 1 *Ibid.* 68. *Smith vs. Isaacs*, 1 *Ibid.* 151. *Miller vs. Dow*, 1 *Ibid.* 412.

And in the case of *Overfield vs. Christie & Al.* (7 *Serg. & R. Rep.* 177.) TILGHMAN, Ch. J. delivering the Opinion of the Court, said; "Our law permits all persons whether in or out of seisin or possession, to transfer their claim, such as it is, good or bad, by deed or will. And I have no manner of doubt, that one who enters as a trespasser, clears land, builds a house and lives in it, acquires something which he may transfer to another; and if the possession of the two added together, amounts to twenty-one years, and was adverse to him who had the legal title, the Act of Limitations will be a bar to his recovery."

Actual occupation of land for 21 years, however tortious or destitute of colour of title, gives a right to the extent of the inclosure, against all the world, but the State. *Munshower & Al. vs. Patton*, 10 *Serg. & R. Rep.* 334.

*But no Act or Deed which is void can be the Foundation of an adverse Possession, for it can give no COLOUR OF TITLE.*

A sheriff's deed, which is void for want of jurisdiction in the Court under whose judgment the sale took place, is not such a conveyance as that a possession under it will be protected by the Statute of Limitations. *Den ex dem. Walker vs. Turner*, 9 *Wheat. Rep.* 541. And in citing the case of *Harris and Holmes vs. Bledsoe's Lessee*, decided by the Supreme Court of Errors and Appeals of the State of Tennessee, in January, 1821, the SUPREME COURT of the United States, coincide with the opinion given by the COURT of Tennessee, and say; "But the infirmity of the defendant's title lay in one of the links of the chain, which was that of a deed from executors who had no power to sell and convey by the law, nor was it given by the Will of the Testator. Even a deed of confirmation, which was executed with a view to cure this defect in the title, was unavailing, 'because,' to use the language of one of the Judges, 'the Act to be confirmed was void.'" *Ibid.* 551.—& *Vide Pray vs. Pierce*, 7 *Mass. Rep.* 383.

In the case of *The Lessee of Powell & Al. vs. Harman*, on a certificate of division of Opinion of the Judges of the Circuit Court of the United States, for the District of West Tennessee, THE SUPREME COURT of the UNITED STATES, at their January Session, 1829, ordered it to be certified to the said Circuit Court, "That a void deed is not such a conveyance, as that a possession under it will be protected under the Statute of Limitations." *Peters' Rep. (Sup. Ct. U. S.)* 241, 242.

In the case of *Galatian & Al. vs. Cunningham*, (On Appeal,) 8 *Cov. Rep.* 374.) WOODWORTH, J. said; "The question of confirmation applies only to the purchase by the trustee; that being a subject of confirmation. If the previous proceedings were fraudulent and void, it was incapable of confirmation. In *Cok. Lit.* 295, b., the doctrine is laid down, that a confirmation may make a voidable or defeasible estate good; but it cannot strengthen a void estate." (5 *Vin.* 389, (Y.) pl. 5 S. P.)

In the case of *Bromley vs. Holland & Al.*, (Cooper's Cas. in Ch. 24.) ELDON, LD. CHANCELLOR, said; "I do not see how a deed which is null and void is capable of confirmation."

A void lease is incapable of confirmation at law. *Sinclair vs. Jackson ex dem. Field*, (In Error,) 8 Cow. Rep. 544, 588.

The purchaser of a real estate of a minor cannot avail himself of the prescription *brevi temporis*, if all the legal formalities were not observed in the sale. *Francoise vs. De La Ronde*, 8 Martin's Rep. 619, 631; The COURT, speaking of the defendant's deed, said; "It purports to be a sale, made by a tutrix of the property of her ward, and as such is wholly informal and illegal, the requisites of the law cited not having been complied with. The vendee saw most clearly that he was pur-chasing from one person the property of another."

That deeds which are absolutely void cannot be the foundation of title, or that a *Cestui que trust* can claim nothing under a deed which is fraudulently obtained by his trustee or agent acting under his authority, need not to be controverted. *Brooks vs. Marbury*, 11 Wheat. Rep. 90.

Possession under a void execution was obtained by the attornment of the defendant's tenant: *Held*, that the attornment was void; that the possession thereby obtained was not adverse to the defendant, or his assigns: and must be held as the tenant held it, (viz.) as the tenant of the defendant, or his assignee. *Hoskins vs. Helme*, 4 Littell's Rep. 310.

"There was another ground of defence mentioned and discussed upon the argument; and that was the existence of an adverse possession of 20 years, sufficient to toll the plaintiff's entry. From the time that *Miller* and the other tenants surrendered their possessions to *Taylor*, to the time of bringing the suit, above 20 years had elapsed, and if the Statute of Limitations had begun to run from the time of that surrender, the lessors of the plaintiff would undoubtedly have been barred. But it did not begin to run, for reasons which I shall presently mention. It has been urged that there was a suspension of the Statute by reason of coverture, rights in remainder, &c. This, however, is a mistake. There was no disability on the part of *Lady Stirling*, and she owned the whole estate in fee, under her husband's will, at the time of *Taylor's* entry."—"But the reason why the Statute of Limitations did not then begin to run against her, is this, that the surrender was not, of itself, and without reference to the title of *Taylor*, a disseisin or ouster sufficient to set the Statute in motion. There is no fact found by the special verdict amounting to an ouster, unless it be, what is termed in the case the attornment of the tenants in acknowledging to hold or accepting leases under *Taylor* instead of *Lady Stirling*. But unless *Taylor* was lawfully entitled to the possession, this attornment could not, in any way, prejudice the rights of *Lady Stirling*, and it was, of itself, null and void." *Jackson ex dem. Livingston & Al. vs. De Lancy and Russell*, (In Error,) 13 Johns. Rep. 552, 553. (Per KENT, Ch. J.) & Vide *Jackson ex dem. Van Beuren & Al. vs. Vosburgh*, 9 Johns. Rep. 270, 277.

Where *A.*'s tenant, from year to year, takes a lease from *B.*, the act is void; and cannot work an adverse possession against *A.* *Jackson ex dem. Williams & Al. vs. Miller*, 6 *Cov. Rep.* 751.

In the case of *Jackson ex dem. Winthrop vs. Waters*, (12 *Johas. Rep.* 365,) the plaintiff produced the Letters Patent to *Elkanah Dean*, and others, issued by the Colonial Government of the Province of *New-York*, dated the 11th of *July*, 1769, and made out a regular title, under that patent, to lot No. 70. The possession of the defendant was admitted.

The defendant produced a writing dated the 28th of *June*, 1768, from *Francis Mackay*, who claimed under a grant from the *French Canadian* Government, to one *La Gauchetierre*, prior to the conquest of *Canada*, by which one *Jaques La Framboise* was permitted to take two lots of land in *Mackay's Seignory* on *Lake Champlain*, and settle himself there. *La Framboise* had entered in 1763, by permission from *Mackay*, but did not continue long; and again in 1768 entered under the above writing from *Mackay*, and continued there until the *American* war, having cleared about twelve acres, when he left the premises; and again returned in 1794, and remained in the possession until *January* 25, 1803, when he conveyed to *Charles L. Sailley*, in fee, all his right in the said Lot No. 70 in *Dean's* patent. On the 17th of *March*, 1803, *Sailley* conveyed to the defendant in fee.

*THOMPSON*, Ch. J. delivered the Opinion of the Court, and after discussing the question of title, in conclusion, said; "The doctrine of this Court with respect to adverse possession, is, that it is to be taken strictly, and not be made out by inference, but by clear and positive proof. Every presumption is in favour of possession in subordination to the title of the true owner. (9 *Johas. Rep.* 167.) It must be hostile in it's inception, and continued so for twenty years; and must be marked by definite boundaries. (1 *Johas. Rep.* 156. 2 *Johas. Rep.* 230.) The possession held by *La Framboise*, prior to his conveyance to *Sailley*, in 1803, cannot be deemed adverse, if his original entry under *Mackay*, is not to be so considered, as it clearly is not, it being taken under a foreign government, which we must reject as a legitimate source of title. The plaintiff must, accordingly, have judgment."

"Deeds conveying the whole property of a person making them to a woman with whom he cohabited, without any proof of valuable consideration paid by her, she not having means to make such purchases, will be presumed to be void, as against creditors. The Statute of Limitations does not run in such cases." *Buist & Rowand vs. Smyth, Adm'r.* &c., 2 *Eq. Rep.* (*Dessaussure's*) 214.

A title void in itself, will prevent him in whose favour it was executed, from pleading prescription. *Dufour vs. Camfranc*, 11 *Martin's Rep.* 715. *Fique vs. Hopkins & Al.*, 4 *Martin's Rep.* (*N. S.*) 224. *Bonne & Al. vs. Powers*, 3 *Ibid.* (*N. S.*) 462.

The prescription of four years against minors, runs only against them for those acts where the forms of law have been pursued in the alienation of their property. *M. & F. Gayoso De Lemos vs. Garcia*, 1 *Martin's Rep. N. S.* 324.

In the case of *Rabineau vs. Cormier* (1 *Martin's Rep. N. S.* 461.) THE COURT said; "Under the circumstances of Error on the part of the Vendor in delivering property not sold, and Error on the part of the Vendee, in taking possession of that which he did not purchase, the question is can the latter hold it by prescription? We think not. An important and indispensable requisite is wanting, to make out a title, of the kind; the intention to possess. The Vendee intended to enter into, and hold the property sold him. What he possessed over and above the quantity purchased, was in error."

"If the title under which the acquisition is made, be null in itself, from defect of form, or discloses facts which show the person from whom it is acquired has no title, it cannot form the basis of this prescription; [*Prescriptio longi temporis*,] because the party acquiring must be presumed to know the law, and consequently wants the *animo domini*, which is indispensable in cases of this kind. But where the title is free from these defects, and the property is not transferred, by want of title in the party making the transfer, then it forms a good ground for the prescription; or in other words, the enquiry is, whether the error be one of fact, or of law." *L. & F. Frique vs. Hopkins & Al.*, 4 *Martin's Rep. N. S.* 324.

But where possession is taken and held under an instrument which is *not void* but only *voidable*, the prescription will run. So the Testator's concubine may prescribe under his will, against his brothers and sisters. And the action of *inofficiosi testamenti*, by which they might avoid such will, is barred by the lapse of five years. *Carrel's Heirs vs. Cabaret*, 7 *Martin's Rep.* 375, 408.

Devise to trustees in fee, in trust to permit A. H. to receive the rents and profits for life; remainder to W. H. in tail; remainder to J. S. in fee: *Held*, that a fine with proclamations, levied by W. H. to a stranger in the lifetime of A. H. was void; and therefore the heir of J. S. was not barred by non-claim and want of entry. *Doe ex dem. James & Ux. vs. Harris*, 5 *M. & S. Rep.* 326.

A Sheriff's deed, which recites the execution under which the lands in dispute were sold, as having been tested and signed by the Deputy Clerk, shall enure as colour of title. For although the constitution declares, that all writs shall bear teste and be signed by the Clerks of the respective Courts, yet a Writ of Execution is not necessarily void because it bears teste and is signed by a Deputy Clerk; because the Act of 1777, Ch. 2 Sec. 95, provides that in the event of the death of the principal Clerk, the Deputy shall sue out writs and other process. *Den ex dem. Jones vs. Putney*, 3 *Murph. Rep.* 562.

A grant of Administration which was originally void, and not merely voidable, can acquire no validity from an acquiescence of twenty years, or any longer period. And the tenants who held under a conveyance from the administrator, executed upon a sale made twenty-six years before the trial, in pursuance of a license from the Court, to sell the whole real estate of the Intestates to pay their debts, could not set up such conveyance and their possession under it in bar of the demandant's ac-

tion. WILDE, J. in delivering the Opinion of the Court, said; "Nor can lapse of time render an act valid, which was originally void. *Quod ab initio non valet, tractu temporis non convalescit.*" It was also Held, That the Statute of Massachusetts, of 1817, Ch. 190, § 12, by which actions to recover real estate sold by administrators, &c. on license, are limited to five years, applies only to sales made subsequently to the passing of the Statute. Such a sale made previously to the passing of the Statute, may be avoided after the lapse of twenty years. *Holyoke vs. Haskins & Ux.*, 5 Pick. Rep. 20, 27.

In the case of *La Frambois vs. Jackson ex dem. Smith & Al.* (In Error, 8 Cow. Rep. 589, 605.) COLDEN, Senator, said; "I admit, also, that if an adverse possession be claimed under a grant or conveyance which never could have been the foundation of a good title, it cannot bar the recovery of one who shews a perfect title."

*And for this Reason it is that Statutes of Limitations do not extend to cases of Fraud; and that no Act or Deed, which is Fraudulent can be the Foundation of an adverse Possession; because, being absolutely VOID, and not merely VOIDABLE, it cannot afford COLOUR of Title; and without COLOUR of Title, there is nothing whereby an ADVERSE POSSESSION can be sustained.*

"The common Law of England abhors every species of covin and collusion." *Roberts on Fraud. Conv.* 520, Ch. 5. Sect. 1.

"So general, indeed, is the condemnation of all fraudulent acts by the Law of England, that a fraudulent estate is said in the masculine language of the books, to be no estate in the judgment of the Law. It forfeits the protection of every statute which gives confirmation to doubtful titles, and while a disseisor has the benefit of the Statutes of Fines and Limitations in support of his wrongful title, a title acquired by covin is indefinitely open to be disputed, and even acts, as well judicial as others, which of themselves are just and lawful, if infected with fraud, are in judgment of Law vitious and unavailing; for the maxim is *quod alias bonum et justum est, si per fraudem petatur, malum et injustum efficitur*. All the partialities of the Law expire under its antipathy to Fraud." *Ibid.*

"According to the greatest authorities a covinous conveyance of Land is as no conveyance as against the interest intended to be defrauded, and ought, by the rules of good pleading, so to be treated, where a party is seeking to avail himself of the protection of the Statutes of Fraudulent conveyances, for the maxim is *pro possessore habetur qui dolo desiit possidere.*" *Ibid.* 596.

Length of time may bar an Equity; twenty years possession bars an Equity of redemption; but no time can cover a fraud. "It is true that in cases of fraud no time can cover the fraud." *Pickering vs. Lord Stamford*, 2 Ves. Jun. 230.

A title in whatever manner perfected, if obtained by Fraud is void. *Galatian vs. Erwin*, 1 Hopkins' Ch. Rep. 48, 55. *Smithwick & Al. vs. Jordan*, 15 Mass. Rep. 113. *Jackson ex dem. Gilbert vs. Burgott*, 10 Johns. Rep. 457, 461. *Brooks vs. Marbury*, 11 Wheat. Rep. 90. *Lio-*

*ington vs. Hubbs & Al.*, 2 Johns. Ch. Rep. 512. *Boyd vs. Dunlap*, 1 Johns. Ch. Rep. 482. *Wendell vs. Van Rensselaer*, *Ibid.* 350. *Bright Ex'or. vs. Eynon*, 1 Burr. Rep. 395. *Gubbins vs. Creed*, 2 Sch. & Lefr. 223. *Carew vs. Johnston*, *Ibid.* 307. *Kennedy vs. Daly*, *Ibid.* 355, 375, 379, 380. *Giffard vs. Hort*, 1 *Ibid.* 386, 409.

"In *Fermor's Case*, (3 Co. 77.) it was resolved that a fine levied by "Fraud was not binding, 'and that such fraudulent estate was as no estate in judgment of Law,' and it was declared that all acts and deeds, "judicial as well as extra judicial, if mixed with fraud were void." *Jackson ex dem. Gilbert vs. Burgott*, 10 Johns. Rep. 463. (*Per KENT*, Ch. J. *delivering the Opinion of the Court.*)

Fraud will vitiate any contract. *Willson vs. Foree*, 6 Johns. Rep. 110. *Whelan vs. Whelan*, 3 Cow. Rep. 537. *Seymour vs. Delancey*, 3 Cow. Rep. 445. *Murray vs. Palmer*, 2 Sch. & Lefr. 474. *Bliss & Al. vs. Thompson*, 4 Mass. Rep. 488. *Carroll & Al. vs. The Boston Marine Insurance Company*, 8 *Ibid.* 515.

Where a conveyance of Land was obtained by fraud and imposition, and the same was acknowledged and recorded, and possession taken by the grantee, it did not operate such a disseisin as disabled the grantor afterwards to devise the estate. *Smithwick & Al. vs. Jordan*, 15 Mass. Rep. 113.

A grantee under a fraudulent conveyance cannot acquire a title by possession against the creditors of the grantor. *Beach vs. Catlin*, 4 Day's Rep. 284.

In this case (Page 294) SWIFT, J. said; "The other question is, "whether the defendant can protect himself by the possession of fifteen "years under the Statute concerning the possession of Lands. It is "unnecessary to consider the question whether fraud will take the case "out of the Statute; for I apprehend, on a sound construction, it will "be found neither to be embraced by the words, nor comprehended "within the meaning of the Statute; and it would be a new idea to "construe a Statute liberally for the protection of Fraud."

"It is generally true that a man shall not be received to aver against "his own deed. But the case of fraud is always excepted which viti- "ates every transaction: and a deed obtained by fraud is to be consid- "ered as a void contract as to the fraudulent party." *Bliss & Al. vs. Thompson*, 4 Mass. Rep. 492.

In the case of *Kirk & Al. vs. Smith ex dem. Penn.* (IN ERROR,) (9 Wheat. Rep. 241, 288.) MARSHALL, CH. J. delivered the Opinion of the Court; in speaking of "those rules which apply to Acts of Limitation "generally," he said; "One of these which has been recognized in the "Courts of England, and in all others where the rules established in "those courts have been adopted, is, that possession to give title must "be adversary." And he added; "To allow a different construction, "would be to make the Statute of Limitations a Statute for the encour- "agement of fraud—a Statute to enable one man to steal the title of



“another by professing to hold under it. No laws admit of such construction.”

*And it matters not, whether a Fraud be committed against a PARTY to the fraudulent Transaction, or against third Persons, NOT Parties thereto.*

An agreement may be infected with fraud by being a deceit on other persons not parties to that agreement. “Particular persons in contracts shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect of other persons, who stand in such a relation to either as to be affected by the contract or the consequences of it.” *Earl of Chesterfield & Al. vs. Sir Abraham Jansen*, 2 Ves. Sen. Rep. 156. & *Vide Whelan vs. Whelan*, 3 Cow. Rep. 537.

“‘Whether a transaction be fair or fraudulent,’ is often a question of Law: it is the Judgment of Law, upon facts and intents. The Indemnity, which is the consideration of the deed in question, I allow to be a good, valuable and true consideration: and I allow this deed to be a valid transaction, as between the parties. But valid transactions, as between the parties, may be fraudulent by reason of covin, collusion, or confederacy to injure a third person: for instance—A. buys an estate from B. and forgets to register his purchase deeds: if C. with express or implied notice of this, buys the estate for a full price, and gets his deeds registered: this is fraudulent, because he assists B. to injure A. Or, if a man, knowing that a creditor has obtained a judgment against his debtor, buys the debtor’s goods for a full price, to enable him to defeat the creditor’s execution; it is fraudulent. Again, if a man knowing that an executor is wasting and turning the testator’s estate into money, the more easily to run away with it, buys from the executor, with that view, though for a full price; it is fraudulent.” *Sir Edward Worsley & Al., Assignees, &c. vs. De Mattos & Slader*, 1 Burr. Rep. 474. (Per Lord MANSFIELD, delivering the Opinion of the Court.)

*Nor is the Investigation of Fraud, exclusively confided to Courts of EQUITY; Courts of LAW have, also, Jurisdiction in such Cases. The difference is, that at LAW, Fraud must be PROVED; in EQUITY it may be PRESUMED.*

“Courts of Equity, and Courts of Law, have a concurrent jurisdiction, to suppress and relieve against Fraud. But the interposition of the former, is often necessary for the better investigating truth, and to give more complete redress.” *Bright, Ex’or. &c. vs. Eynon*, 1 Burr. Rep. 396. (Per Lord MANSFIELD,) & *Vide 3 Black. Comm. 431, 437, 439. Boring vs. Singery*, 3 Har. & M’Hen. Rep. 404.

“With respect to fraud, the distinction between legal and equitable jurisdiction is this: that at law it must be proved, not presumed; so that equitable jurisdiction may be exercised, when a court of law could not enter into the question. (18 Ves. 483.) A variety of cases, have been decided, and relief afforded in Equity, where from the nature of the transaction and the situation of the parties, fraud and imposition might be presumed. (3 P. Wm. 139. Pow. on Con. 31.)” *Galatian & Al. vs. Cunningham*, (On Appeal,) 8 Cow. Rep. 370. (Per WOODWORTH, J.)

"Courts of law as well as of equity have cognizance of fraud, but Courts of law relieve against it negatively, by inquiring into circumstances, and not permitting plaintiffs to recover in actions brought on deeds or contracts fraudulently obtained, and thus virtually annulling such deeds or contracts as against the fraudulent parties." *Lamborn vs. Watson*, 6 Harr. & Johns. Rep. 252, 255. (Per BUCHANAN, CH. J. delivering the Opinion of the Court.)

"Fraud will invalidate in a Court of Law, as well as in a Court of Equity, and annul every contract and every conveyance infected with it." *Jackson ex dem. Gilbert vs. Burgott*, 10 Johns. Rep. 462. (Per KENT, CH. J. delivering the Opinion of the Court.) & *Vide Bright, Ex'or. vs. Eynon*, 1 Burr. Rep. 397. *Beach vs. Catlin*, 4 Day's Rep. 293. *Merrill vs. Meachum*, 5 Day's Rep. 344.

"Fraud will invalidate in a Court of Law as well as in a Court of Equity. We all remember the case of *Wyndham v. Chetwynd*, P. 1775. 28 G. 2. in this Court: where the Court directed the Jury to find "non devisavit," though there was a devise in fact; but it was obtained by fraud, and therefore considered as no devise at all." *Bright, Ex'or. &c. vs. Eynon*, 1 Burr. Rep. 397. (Per FOSTER, J.)

A person claiming under the grantor of a deed, but claiming against the deed, is not precluded from showing that it was obtained by fraud. BUCHANAN, CH. J., in delivering the Opinion of the Court, said; "The whole of the evidence set out in the third bill of exceptions, was expressly offered for the purpose of showing, that the deed from Zachariah and Harriet Tucker to Soper, the defendant, was fraudulently obtained, and was all suffered to go to the Jury, as the proper tribunal to determine the question of fact." *Hurn's Lessee vs. Soper*, 6 Harr. & Johns. Rep. 276, 281.

Statutes of Limitations, only take place from the time the right of action accrues; and if there be fraud, from the time of its discovery. *Jones vs. Conoway & Al., Ex'ors. &c.*, 4 Yeates' Rep. 109.

In the case of *Riddle vs. Murphy & Al.*, (7 Serg. & R. Rep. 235.) GIBSON, J. delivering the Opinion of the Court, said; "The Court, very properly charged, that if the sale was fraudulent, the act began to run against the devisees of Cornelius Murphy, or those who represented them, only from the time the fraud became known to the person then having the title."

But a bona fide purchaser for a valuable consideration from a fraudulent grantee, if unaffected with notice either actual or constructive, will, at Law, be protected. *Dexter vs. Harris*, 2 Mason's Rep. 536. In this case STORR, J. delivering the Opinion of the Court, said; "There is no such principle of Law, as that what is matter of record shall be constructive notice to a purchaser. The doctrine upon this subject as to purchasers is this, that they are affected with constructive notice of all, that is apparent upon the face of the title deeds, under which they claim, and of such other facts as those already known necessarily put them upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to their knowledge. But of other

"facts extrinsic of the title, and collateral to it, no constructive notice "can be presumed; but it must be proved."

*But DEFECTIVE Conveyances, which are not absolutely void, may in certain Cases be the Foundation of an Adverse Possession; as where the Occupant or those under whom he claims were BONA FIDE Purchasers; and especially if such defective Conveyance were received from the Lessor of the Plaintiff, or any Person from, through, or under whom the Lessor claims the beneficial Title.*

In the case of *Jackson ex dem. Vanderlyn & Betts vs. Newton & Al.* (18 Johns. Rep. 355.) the lot of which the premises in question were part, was patented to *Timothy Church*, in July, 1786. In the year 1797, *Joshua Newton*, went into possession of the premises under a contract for the land with *Eleazar Church*, son of *Timothy Church*; on the 19th February, 1798, *Joshua Newton* received from *Timothy Church*, a deed for the premises, which had no actual Seal, but a flourish at the end of the grantor's name, with the letters *L. S.* made with a pen. When the deed was executed it was said there was no wax or wafers, and that a flourish with a pen was equally good; *Joshua Newton* paid a part of the consideration money down, and gave a mortgage for the residue, which he afterwards paid and took up. The defendants were *bona fide* purchasers under him, and he and they had held the uninterrupted possession, until the commencement of the ejectment suit in May term, 1818.

In the year 1800, *James* and *William Anderson* recovered a judgment against *Timothy Church*, and issued an execution, by virtue of which the lot containing the premises in question was sold to the said *James* and *William Anderson*, who received a Sheriff's deed therefor, bearing date June 4, 1801. On the 19th July, 1808, *John Taylor* recovered a judgment against *William Anderson*, which was revived, by *Scire Facias*, against his heirs and terre-tenants, and the record thereof docketed 8 August, 1817; upon which a *Fi. Fa.* issued, by virtue whereof the said lot was sold to the lessors of the plaintiff, who received a deed therefor from the Sheriff of the county of Chenango, dated October 11, 1817.

It was Held, that the defendant's possession was adverse to the lessors of the plaintiff, and sufficient to defeat the suit.

In the case of *Strange vs. Durham*, (2 Bay's Rep. 429,) it appeared that the land in dispute was granted to the plaintiff's father more than 20 years before; that the father was dead, and that the plaintiff was his heir at law. The defendant offered in evidence a conveyance made by the plaintiff's Attorney, one *Andrew Kidd*, under which deed he claimed, but as the power was a joint one to the Attorneys, four in number, and only one of them had made the deed, an exception was taken to it on the trial, as nugatory in itself, which was sustained by the presiding Judge, TREZEVANT. The defendant subsequently relinquished all claim under his deed from *Kidd*, the Attorney of the plaintiff, and rested solely on his possessory right under the Statute of Limitations. Against this right of possession it was alleged, that as the defendant went into possession of the land by virtue of this purchase and deed from *Kidd*, which he knew to be defective, he could not afterwards relinquish his claim to

it, and set up title by possession only, though it was admitted he might have done so, if he had not accepted this conveyance. And of this opinion was the presiding Judge in his charge to the jury, but they found a verdict for the defendant. Upon a motion for a new trial, on the ground of the verdict's being against law, and the charge of the Judge who tried the cause; all the other Judges concurred in opinion, however, that there should not be a new trial, as it could not vary the plaintiff's right of action whether the defendant knew that his title was good or bad. It did not depend on the defendant's knowledge or ignorance of the plaintiff's title, but on the Statute, which had expressly taken away the plaintiff's remedy, unless his action had been commenced within five years from the time of defendant's entry upon the land.

In the case of *M'Koy vs. The Trustees of Dickinson College*, (5 *Serg. & R. Rep.* 254,) it was *Held*, that a commissioner's deed under their common seal was no evidence of title: but that it was evidence for the purpose of showing that one who was proved to have been in possession, held adversely to the plaintiff in a case where the defendant relies on the Statute of Limitations as a defence.

In the case of *Jackson ex dem. Roosevelt & Al. vs. Wheat*, (18 *Johns. Rep.* 40,) the plaintiff claimed title under the *Minisink* patent. The defendant set up in his defence, a title by possession, and also that the lot occupied by him was not within the bounds of the *Minisink* patent.

*John Gillet*, a witness, testified, that the defendant had lived on the premises about forty years; that *William Gillet*, uncle to the witness, was the first occupant of the next lot east in *Deerpark*. That the defendant bought of *William Gillet*; but witness did not know whether defendant had a deed; that *William Gillet* had a deed, and the witness supposed the defendant had one. *William Gillet* claimed title under the *Minisink* patent, and purchased of *Henry Wisner*, one of the proprietors.

The plaintiff called on the defendant to produce the deeds mentioned by the witness, which he refused to do, and they were not produced.

The defendant then offered to prove that the premises were not contained within the bounds of the *Minisink* patent, which evidence being objected to, was over-ruled by the Judge.

"*Per Curiam*. 1. The possession of the defendant was, undoubtedly, adverse: it has been continued for a period of between 40 and 50 years, under a claim of title, by purchase from *Gillet* who had a deed. It was not necessary to produce that deed though called for by the plaintiff. Suppose the deed had been lost, or when produced was found to be defective, that could not have destroyed the effect of the defendant's possession. In *Smith vs. Lorillard*, (10 *Johns. Rep.* 356.) *Ken*, Ch. J. said, "that after a continued possession for twenty years, under pretence or claim of right, the actual possession ripens into a right of possession which will toll an entry;" and in *Smith vs. Burtis*, (9 *Johns. Rep.* 180.) *SPENCER, J.* said, (*VAN NESS J.* and *YATES, J.* concurring) that "it had never been considered necessary to constitute an adverse possession, that there should be a *rightful* title. Whenever this defence is set up, the idea of right is excluded; the fact of possession, and the *quo animo* it was commenced and continued, are the only tests;" and in *Jackson v. Ellis*, (13 *Johns. Rep.* 120.) the Court said,

“ that it had been repeatedly ruled in this Court, that an entry under  
 “ claim or colour of title is sufficient to constitute an adverse holding. It  
 “ is not necessary, for this purpose, that the title under which the entry  
 “ is made, should be a good and valid title. (2 *Caines*, 183.)”

Though the possessor claim under written evidence of title, and on producing that evidence, it proves to be defective, yet the character of his possession, as adverse, is not thereby affected. If the entry is under colour of title, it is sufficient; the possession will be adverse. The fact of possession, and its character, or the *quo animo*, are the test. *La Frombois vs. Jackson ex dem. Smith & Al.* (In Error,) 8 Cow. Rep. 589.

In the case of *Hampton's Lessee vs. M'Ginnis*, (1 Tenn. Rep. 286,) it was Held, that where the defendant had been in possession for seven years under colour and claim of title, it was not necessary to shew a regular chain of conveyance to himself from the first purchaser, under whom he claimed title, and who held under a county warrant, but had conveyed the premises, by deed, before he had obtained that warrant, to one from whom the defendant deduced a regular chain of title. & Vide *Craddock's Lessee vs. Stalcup*, 1 Tenn. Rep. 351. *Sawyer's Lessee vs. Shannon & Al.* Ibid. 465.

“ If a person takes a grant or conveyance from one having, himself,  
 “ a bad or defective title, the title is also *prima facie*, bad or defective,  
 “ in the hands of the grantee. If it be not so on account of his being  
 “ an innocent and *bona fide* purchaser without notice, it is for him, or  
 “ those claiming under him, to maintain that he was such purchaser  
 “ without notice; and if he, or those claiming under him, do not do so,  
 “ witnesses shall not be permitted to do it for them.” *Galatian & Al.*  
*vs. Cunningham*, (On Appeal,) 8 Cow. Rep. 382. (Per COLDEN, Senator.)

Conveyances good in point of form, and professing to convey the entire title, although executed by a grantor, who has not a good title, or even no title at all, are notwithstanding a sufficient foundation for an adverse possession, where the grantee is a purchaser for a valuable consideration; and has no notice, either actual or constructive, from the face of his deed, from the deeds through which he deduces his title, or from any other source, of the existence of a better title.

Letters Patent, bearing date the 13th September, 1790, for lot No. 7. in Ovid, were granted to *Jacob Van Gelder*, a deceased soldier, who died the 18th January, 1779, leaving nine children, *Jacob*, *Reuben*, *William*, *Elijah*, *Mary*, *Abigail*, *Elizabeth*, *Mercy*, and *Sally*. *Reuben Van Gelder*, one of the children of the patentee, on the 13th of October, 1791, executed to *Stephen Thorne*, a deed for the entire premises, stiling himself administrator and heir of *Jacob Van Gelder*. On the 14th February, 1794, *Stephen Thorne*, executed a deed for the same premises to *Peter Smith*; and on the 8th December, 1807, *Peter Smith*, executed a deed for the premises to the Defendant.

On the 7th January, 1792, *Jacob*, *William*, and *Elijah*, three of the children of the patentee, executed a quit-claim deed to *Reuben Van Gelder*, for the premises. On the 22d January, 1812, *Sarah*, *Mercy*, *Mary*,

& *Abigail Van Gelder*, and *Elizabeth Wichill*, the five other children of the patentee, executed a quit-claim deed of the premises to *Reuben Van Gelder*; and on the 19th August 1713. *Solomon Van Gelder*, the husband of *Mercy*; *Elijah Van Gelder*, and *Joseph Van Gelder*, the husband of *Mary*, executed a deed of the premises to *Reuben Van Gelder*.

*Elijah Van Gelder*; *David Van Gelder*, and *Abigail* his wife; *Solomon Van Gelder* and *Mercy*, his wife; *Elizabeth Philo*; *Sally Van Gelder*, and *Joseph Van Gelder*, and *Mary*, his wife; executed to *William Preston*, a deed of the premises bearing date the 13th February, 1798.

*Jacob, William & Elijah Van Gelder*, executed a deed of the premises bearing date the 15th March, 1798, to *William Preston*. On the 4th October, 1798, *William Preston*, executed a deed of the same to *David Matthews*, who by his will dated 29th August, 1810, devised an undivided moiety, to *John Matthews* his only son, and the residue to his said son, and *Robert Morris* and *Garrit Wendell*, in Trust, for certain purposes stated in the will.

When *Preston* first attempted to purchase the lot from the heirs of the deceased soldier, he was told that *Reuben* had sold the lot to *Thorne*. The witness saw *Thorne* pay money to *Reuben*, and all the other heirs received a share of the money; but the witness did not know whether they were present at the sale to *Thorne*.

The Court held that there was an *adverse possession* which protected the defendant, and said; "The conduct of *Reuben*, subsequently to the conveyance made by him, confirms in a great degree, what has been stated to have been the intentions of all the parties when it was executed. The consideration received was divided between all the children. They, therefore, supposed the sale made by *Reuben* sufficient to pass the entire lot, or they never would have accepted of their proportion of the consideration received for it; and *Thorne*, supposing himself to have obtained a good title, did not hesitate to dispose of it to a person who entered as owner of the whole lot.

"If, therefore, it is conceded that *Reuben's* deed conveyed one ninth part only to *Thorne*, and that if he had entered under it such entry would have been according to his right as tenant in common, and that his co-tenants could not have been disseised, because the possession would not have been adverse to their rights, still this cannot change the character of the defendant's possession, nor the previous possession of his father. Neither of them had any knowledge of this deed. The father purchased by warranty deed from *Thorne*, who represented himself to be the sole proprietor of the lot. As early as July or August, 1792, while the defendant's father was on the lot, *Thorne* went to view it, and avowed himself to be the owner, and sold it for 140*l*. From that period, in strictness, the adverse possession commenced. At all events, it commenced from the date of *Thorne's* deed to the elder *Smith*, which was in February, 1794. It is evident, therefore, that the doctrine, in relation to the possession of tenants in common, does not apply to this case. It might as well be urged as applicable to a conveyance made by a stranger, of any lands held in common. And it will not be questioned, that the possession of a purchaser under such a

"deed, given without right on the part of the grantor, would notwithstanding, be adverse to the rightful owners, although held by them in common. But, in the present case, no such tenancy did in fact, exist." It was also held that the adverse possession of *Smith*, the grantee of *Thorne*, was sufficient to defeat the conveyances obtained by *William Preston*, in 1798. And that the conveyances executed by all the children of the patentee to *Reuben*, must enure to the benefit of the defendant, who held under *Reuben*, through *Thorne*. *Jackson ex dem. Preston & Al. vs. Smith*, 13 *Johas. Rep.* 406, 412, 413.

Five years actual adverse possession of a tract of land under a junior grant, will give the tenant a title to so much as he has in actual possession, even against a person who has a paramount title, and is in the constructive possession of the part in dispute. *Middleton vs. Dupuis*, 2 *Nat & M<sup>c</sup> Cord's Rep.* 310.

So in the case of *Jackson ex dem. Belden & Al. vs. Thomas*, (16 *Johas. Rep.* 293,) where the plaintiff claimed the premises in question as part of the *Minisink* patent, the question of title depended on the adjustment of the boundary lines of that, and of four contiguous patents, viz: *John Evans' Patent*, *Bridge's Patent*, *Holcomb's Patent*, and *White's Patent*. On the trial the defendant proved that part of the premises was within *White's* patent, and all the land covered by this patent was relinquished on the trial by the plaintiff. The defendant also proved that of the residue of the premises he had been in possession for more than twenty years, as a purchaser from *Holcomb*; and that *Holcomb*, after obtaining his patent, and several years before the defendant's purchase from him, had taken possession of the same, claiming it as included within the bounds of his said patent. It was decided, however, by the Court, that this part of the premises lay within the lines of the *Minisink* patent, and therefore belonged to the lessors of the plaintiff. But the defendant had judgment on the ground of his adverse possession; and *SPENCER, Ch. J. who delivered the Opinion of the Court*, said; "It appears to me, that an adverse possession is abundantly made out. When the patent was granted to *Holcomb*, he did not live on the premises in question; but ever since the granting of the patent, that part of the premises not included in *White's* patent, have been held by *Holcomb*, and those who have purchased of him; and the fact is proved, that the defendant is in possession claiming title under *Holcomb's* patent, and he certainly entered into possession since the granting of the patent to *Holcomb*, for his possession has been for twenty, or twenty-five years." "If the defendant was not in possession when *Holcomb's* patent issued, and the case shows he was not, and if these premises have been held ever since that patent issued, by *Holcomb*, and those claiming under him, then the defendant's possession was, in its inception, adverse.

"The principle, however, that possession, must in its inception be adverse, and continue so, is not well understood. In those cases in which that observation occurs, nothing had happened to change the character of the first possession, and that was considered as denoting *quo animo* the possession was held after the first entry.

"If one enter on land without any title or claim, or colour of title, the law adjudges the possession to be in subservience to the legal owner, and no length of possession will render the holding adverse to the title of the owner; but if a man enters on land, without claim or colour of title, and no privity exists between him and the real owner, and such person, afterwards, acquires what he considers a good title, from that moment his possession becomes adverse. I am not sensible that the Court have ever held a contrary doctrine.

"In the present case, even *Holcomb* was not in possession of these premises when his patent issued, though he entered immediately after. It appears to me that an adverse possession for a sufficient length of time to bar the plaintiff's right of entry, is clearly established by the evidence."

It will be seen from the facts of this case, that a great part of the above opinion is merely hypothetical, and had no immediate relation to the question before the Court; as the Court unhesitatingly decided that the possession set up by the defendant, "*was, in its inception, adverse,*" the discussion of the question, whether a possession, in its origin, "in subservience to the legal owner," could by any and what subsequent event, be converted into an *adverse* possession, seems to have been uncalled for in the decision of the cause; and consequently the opinion expressed on that point would appear to have only the authority of a *dictum*. But it has since been incidentally recognized as authority; and the extent and meaning of those observations of Chief Justice SPENCER, have been limited and defined. It is also to be remarked, that the qualifying words, "*and no privity exists between him and the real owner,*" materially restrain that generality of expression which would otherwise conflict with the settled course of decisions in that Court; it is not to be imagined, that such was the intention of the Chief Justice.

In the following case of *Jackson ex dem. Ten Eyck & Others vs. Frost*, (5 Cow. Rep. 346) the Supreme Court have explained the meaning of the expressions used by the Chief Justice in the above case.

One ground of defence insisted upon at the trial, was that of an *adverse* possession; in support of which, the defendant "proved, that one *M. Alpin* occupied the premises in question in 1795, claiming them as his own, saying they were in a *gore*; which therefore belonged to the settlers; that *M. Alpin* was in possession 25 years before the trial, and more than 30 years before the suit was commenced; that about 25 years before the trial, he exchanged farms with one *Miller*, now deceased."

The defendant offered to show by *Miller's* declaration, that he had a deed from *M. Alpin*; which evidence was objected to, and excluded by the judge.

The defendant then proved that *Miller* remained in possession 12 or 15 years, whence the possession passed through several hands down to the defendant.

The widow of *Miller* swore that when her husband exchanged with *M. Alpin*, he took a quit-claim deed from *M. Alpin*, who said he thought



he had a good title ; that no rent had been claimed or called for ; and the premises in question were not included in any of the patents ; that this was 27 years before the trial ; that she could not read ; did not see any deed executed ; but *M. Alpin* agreed to give one ; and her husband had a paper which he said was a deed from *M. Alpin*.

The judge charged that the plaintiff had made out a sufficient title and location, and that the defendant had failed in establishing a bar by adverse possession.

The Opinion of the Court was delivered by *SAVAGE*, Ch. J., who, in reference to the defence of adverse possession, said ;

“ The defendant, and those under whom he claims, have had possession for a sufficient length of time. The only difficulty is, as to the character of that possession. Was it adverse ? *M. Alpin* was the first possessor ; he claimed it as his own. Why ? It was a gore ; no rent had been demanded ; and it of course belonged to the settlers. This amounts to saying that he claimed it, because he had no title ; for if it was a gore, then the land belonged to the state. The idea that rent could be demanded, presupposes a landlord, and of course an owner. The deed to *Miller* was given with this parol abstract of the title ; it was not that he owned the land, because the fee was vested in him by purchase or descent ; but it was his because there was no other owner. This is no title on which to rest an adverse possession. The purchaser, who took such a deed, knew that what he purchased amounted to nothing ; for he was bound to know it.

“ I am aware that it was said in the case of *Jackson vs. Thomas*, (16 *John*. 301,) that “ if a man enters on land, without claim or colour of title, and no privity exists between him and the real owner, and such person afterwards acquires what he considers a good title, from that moment his possession becomes adverse.” This doctrine must not be understood as authorizing the purchaser to consider a naked possession a good title. It must be, as I understand the law, such a title as the law will, *prima facie*, consider a good title. Otherwise there would be no uniformity. The character of the possession might be made to depend upon the understanding of the tenant, and the same possession which would be a good defence to one, would be worthless to another. And hence a possession under a French grant was held not to be adverse, because such a grant could not possibly be the source of a good title.

“ The possession of *Miller*, therefore, seems to me to be merely a continuation of *M. Alpin*'s possession, with no greater rights, but precisely of the same character. Admitting, therefore, that the possession of *Miller*'s grantee was adverse, the length of time is not sufficient to bar the plaintiff.”

The defendant, and those under whom he claimed, had been in actual possession of the land in controversy, for more than twenty-five years, under a colour and claim of title, by deed ; *Held*, that the lessors of the plaintiffs were barred ; all their disabilities having ceased more than seven years before the commencement of the suit. *Doe ex dem. Pritchard & Al. vs. Sawyer*, 1 *Hawk's Rep.* 337.

“ The rule *careat emptor*, applies only to purchasers of defective legal

"titles. A purchaser of the legal title is not to be affected by any latent equity, whether founded on trust, fraud or otherwise, of which he has not actual notice, or which does not appear in some deed necessary in the deduction of the title, so as to amount to constructive notice." *Wilcox vs. Calloway*, 1 Wash. Rep. 41. & *Vide Hooe & Harrison vs. Pierce, Adm'r. Ibid.* 217.

In the case of *Dexter vs. Harris*, (2 Mason's Rep. 536,) STORY, J. delivering the Opinion of the Court, said; "The doctrine upon this subject as to purchasers is this, that they are affected with constructive notice of all, that is apparent upon the face of the title deeds, under which they claim, and of such other facts as those already known necessarily put them upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to their knowledge. But of other facts extrinsic of the title, and collateral to it, no constructive notice can be presumed; but it must be proved."

The Statute of Limitations will not run in favour of a purchaser for valuable consideration, who had knowledge of the rights of the parties, nor where he held as tenant in common, and during the minority of the other party. *Saxon & Uz. vs. Barksdale & Al.*, 4 Eq. Rep. (Dess.) 522.

A defendant in ejectment being in possession of the land for which the suit is brought, holding the same by a title adverse to that of the plaintiff for twenty years or more, is not necessarily entitled to a verdict. *Bowie vs. O'Neale & Al. Lessee*, (On Appeal,) 5 Harr. & Johns. Rep. 226. In this case the defendant held as devisee under the will of a husband, the lands in question, which were the property of the devisors wife; it was Held, that such a possession could not create a presumption of title, or prevent the recovery of those deriving title under the wife.

Only an innocent purchaser, obtaining the title without notice, will be protected in equity. A volunteer cannot occupy more favourable grounds than his principal. *Rearden vs. Searcy's Heirs & Al.* 3 Marsh. Rep. (Ky.) 542, 543:

In the case of *Jackson ex dem. Sitzer vs. Wallernire*, (7 Cow. Rep. 353, 357,) the plaintiff brought ejectment for dower set off to his lessor as the Widow of Frederick Sitzer, in the farm possessed by the defendant. The plaintiff proved that the lessor's husband resided on the farm in question, and used it as his own during the coverture, that he died the last day of April, 1821. The defendant gave in evidence a deed from Frederick Sitzer in his life time, dated November 16th, 1785, by which Sitzer granted, &c. and quit claimed to A. Wilcox, his heirs and assigns, all his [S's.] right, title, &c. of, in and to the possession and improvements of the farm in question. Sitzer covenanted in this deed, that he was then truly and lawfully possessed of the premises, as the same were truly granted. From Wilcox, the possession of the land passed through several hands to the defendant, who was in possession when this suit was brought.

SAVAGE, Ch. J. delivering the Opinion of the Court, said; "The testimony of the defendant consists of the facts stated by Halstead; that he purchased the possession of 50 acres of the same lot; and of the

" deed from *Sitzer to Wilcox*. By this deed, *Sitzer* conveys to *Wilcox*, his heirs and assigns, all the right of the grantor, to the possession and improvements of the farm in question ; and covenants that he is lawfully possessed of the premises, as the same are truly granted."

" This deed is one link in the chain of the defendant's title. The farm has been held under it ever since its date, *November 16th, 1785* ; and without doubt the defendant is protected by that deed, and his possession under it ; from the claims of any person, upon the facts as they appear in this case. It was not accompanied with any declarations, as in *Jackson vs. Frost*, (5 *Coven*, 346,) which showed the absence of right or title. The grantor conveys the possession for ever. He does not say that he conveyed a fee ; but such must have been the intent. The deed is inartificially drawn ; but if we apply the rule laid down by Lord *Mansfield*, (5 *Cowp*. 600,) ' that deeds shall operate according to the intention of the parties, if by law they may,' there can be no doubt that it carried a fee. The intention of the grantor was, to pass his title ; and he supposed himself to have an estate of inheritance. (*And Vide 3 Dalk. 477.*)"

#### Judgment for the Plaintiff.

In the case of *Alexander & Al. vs. Pendleton*, (8 *Cranch's Rep.* 461,) *Marshall, Ch. J.* delivering the Opinion of the Court, said ; " But as the contract does not appear on the title papers, but was verbal, a purchaser for a valuable consideration could not be affected by it unless he was a purchaser with notice. Finding *Parthenia Dade* in the quiet and undisturbed possession of four hundred acres of land, forming a parallelogram, limited on the west by the line north 6 west, he had a right to consider that line as established : so far as respected the land of *Parthenia*. He was not bound to know that a private parol agreement existed, which would control the possession. This trust therefore no more passed with the land to *Hartshorne*, than would any other secret trust of which he had no knowledge."

" The various suits which have been instituted by, and against the ancestors of the appellants cannot affect this cause. A suit not prosecuted to a decree or judgment is not constructive notice to a person not a pendente lite purchaser ; and were the law otherwise, those suits, until that instituted in 1796, would convey no notice of the private agreement made in 1741. A knowledge of the suits, therefore, would not imply a knowledge of the trust ; and possession for fifty years, though with knowledge of a better title, if adversary, constitutes a good defence against that title."

" In 1796, *Charles Alexander* instituted a suit against sundry persons claiming the land in controversy for the purpose of altering the boundaries which had been held by *Parthenia*, and those claiming under her, from the year 1732, and which had been surveyed under an interlocutory decree made by the Court of Chancery, in the year 1741. In defending themselves against this claim, the purchasers of this land had a right to unite the possession of *Parthenia Dade* to their possession, without being affected by a secret trust of which they had no notice."

Where the tenant in tail had executed a conveyance in fee, and his

grantee had entered and remained in peaceable and undisturbed possession more than seven years after the death of the grantor, and the plaintiff being under no disability. *Held*, that the possession was protected by the Statute of Limitations. *Wells vs. Newbold, Taylor's Rep.* 197.

*Instruments which do not purport to convey Title, as Leases, Contracts, &c. cannot be the Foundation of an Adverse Possession.*

*Vide ANTE, Page 57, Note [2.]*

In the opinion delivered by JONES, late Chancellor, in the case of *La Frombois vs. Jackson ex dem. Smith & Al.*, (*In Error.*—8 Cow. Rep. 589, 597,) he *Held*, that a claim under an executory contract to convey lands, the consideration being paid, and such contract therefore being capable of being specifically enforced, in equity against the vendor, might be a sufficient claim under colour of title to constitute an adverse possession within the Statute of Limitations: he said; "The writing produced, admitting it to be simply a contract for a conveyance, is in accordance with the possession he [*the Defendant*] held, and the claim of title under it." "It was an express agreement by a person claiming to have the right to contract for the disposal of the land, to convey to him the lot he should locate, when conveyances were to be given, and an agreement that he should enter into immediate possession, and hold the premises thus contracted to be conveyed to him, without rent, until the conveyance should be given.

"Under such an agreement, reduced to writing, and followed up by possession and improvements, the defendant acquired a title in equity to the land, if *Mackay*, the party contracting to convey, had at the time, or afterwards, acquired the right or power to perform his agreement. "It was a contract which equity would have enforced the performance of, and the right of *La Frombois* under it was the more perfect and stable, as the consideration had obviously been already paid or satisfied by him to *Mackay*, and there was nothing further to be done by him to entitle him to a conveyance of the legal title."—And he adds, (*Page 602.*)

"Whatever the right of *Mackay* was, if *La Frombois* went into possession, supposing it to emanate from a legitimate source, and in confidence that his contract entitled him to a conveyance, and that *Mackay* had the right to give the conveyance he promised, his possession would be adverse, notwithstanding his confidence was misplaced, and the title of *Mackay*, under whom he entered, was invalid. Whether a grant of the land under the authority of the French government, prior to the conquest of *Canada* by the British, would vest any title in the grantee, or confer on him the right under the treaty of *Paris* to a patent from the English government, either absolutely or upon terms, are questions which I consider it unnecessary and improper now to discuss. I assume that whatever right *Mackay* supposed himself to have to the land, no evidence appearing to the contrary, he founded upon some title or claim to a title under the colonial government; and his assuming to be entitled, and contracting to convey, gave to the pur-

"chaser under him a color of title, which would characterize the possession of such purchaser under such contract, as adverse against all other claimants."

But this, was the *only* opinion expressed, as to the effect of a claim of equitable title as a foundation of an adverse possession. It is the *legal*, and *only* the legal title or claim, which is brought in question in an action of ejectment; a mere *equitable* title or claim, will avail neither the Plaintiff nor Defendant. *Vide ANTE, Page 32 and Notes thereto. Jackson ex dem. Potter vs. Sisson, 2 Johns. Cas. 321. Jackson ex dem. Smith & Al. vs. Pierce, 2 Johns. Rep. 221. Jackson ex dem. Simmons & Al. vs. Chase, Ibid. 84, 86. Jackson ex dem. Whitbeck & Al. vs. Deyo, 3 Johns. Rep. 422, 423. Jackson ex dem. Kemball vs. Van Slyck, 8 Johns. Rep. 380.)* The *Colour and Claim of Title*, in cases of adverse possession, however defective it may be, must still, according to all the cases hitherto adjudged, be a *Colour and Claim of legal title*; and not a claim of a mere *Equity*.

A mere equity can neither maintain nor bar an Ejectment. *Gilpin vs. Davis, 2 Bibb's Rep. 416.*

*And the TITLE under Colour of which, the adverse Possessor holds, must be adverse to, and different from that of the true Owner; for if such adverse Possessor claim that identical Title as his own, and found his Possession thereupon, and it turns out that he has not obtained it, his Possession will not be deemed adverse to the lawful Owner of that Title.*

*Vide ANTE, Page 51, Note [1.]*

In the case of *Dufour vs. Camfranz*, (11 *Martin's Rep.* 715,) the defendant prescribed under a Sheriff's deed; the Court said, "The title presented here is perfect as it respects form; it pursues the very words of the statute; the defect is a want of right or authority in the Sheriff to make such a conveyance, not a defect in the manner he made it. As nothing therefore appears upon the face of the deed which is defective, the knowledge of want of right in the person who sold, is not brought home to the vendee, and his Error was one of fact not of law. It is difficult to see where is the difference between this case and an ordinary one of sale, where the purchaser acquires, from a person who has no title, by a regularly executed act, before a notary public; in such case the buyer acquires none, but he has that good faith which enables him to plead prescription."

In the case of *Jackson ex dem. Corson & Sebring vs. Cairns & Coles*, (20. *Johns. Rep.* 301,) it appeared, that *Jacob Corson* died seised and possessed of the premises in question, and other real estate, in 1772, leaving three children: *Mary*, the wife of *John Simonson*; *Cornelia*, wife of *Ernest Linder*, and, after his death, wife of *James Duffie*; and, after his death, wife of *Gozen Ryers*; and *Eliabeth*, wife of *Jacob Sebring*. *Mary*, the wife of *Simonson*, died in 1779, leaving two children, *Cornelia*, one of the lessors of the plaintiff, and *John Simonson*, who was living at the time of the trial. *Cornelia*, at the age of 19 years, married *Daniel Corson*, in 1791, from whom she was legally divorced on the 4th of *December*, 1810, by a decree of the Court of Chancery, dissolving the marriage. *Cornelia* the daughter of *Jacob Corson*, and afterwards the wife of *Gozen Ryers*, but before her marriage with him, and whilst

she was the wife of *Duffie*, occupied with her then husband, the premises in question. On the 23d of *January*, 1788, being then the wife of *Gozen Ryers*, she and her husband executed a deed to *Terence Reilly*, for one half of all the lands, &c. of which *Jacob Corson*, Junr. died seised; this deed was never acknowledged by Mrs. *Ryers*; and on the 30th day of the same month, in the same year, *Terence Reilly* re-conveyed the same premises to *Gozen Ryers*. On the 21st of *September*, 1792, *Gozen Ryers* executed to the new loan officers of the county of *Richmond*, a mortgage of the premises in question. On the 13th of *July*, 1795, Mrs. *Ryers* died without issue. On the 5th of *June*, 1800, *Gozen Ryers* executed a mortgage of the same premises to *Richard Wain*, to secure the payment of 2000 dollars. In *January*, 1802, *Gozen Ryers* died. Before the death of Mrs. *Ryers*, her sister *Elizabeth*, one of the lessors of the plaintiff, married *Jacob Sebring*, Junr.; he died on the 4th of *August*, 1803. The mortgage from *Gozen Ryers* to *Richard Wain* was foreclosed and sold under a decree of the Court of Chancery; *Cairns* became the purchaser, for the sum of 6300 dollars, and on the 5th of *August*, 1805, received a deed of the premises from a master. On the 3d of *April*, 1808, *Cairns* paid off the mortgage from *Gozen Ryers* to the new loan officers of the county of *Richmond*.

It was proved, that *Gozen Ryers* was in possession of one half of the *Corson* property, including the premises in question, from the time of his marriage with *Cornelia*, until his death; and that *John P. Ryers*, (his son, by a former marriage,) held possession of it, until after the sale of it to the defendant, *Cairns*. *Gozen Ryers*, claimed the property as his own, by purchase from *Terence Reilly*; and such claim was asserted before and after the death of his wife. *Cairns* had been in possession since the sale to him. The other half of the *Corson* property had been held by *John Simonson* and those claiming under him, for many years, and as far back as the witnesses could remember. *Gozen Ryers* built several houses on the part possessed by him, in one of which *J. Johnson* lived in 1796.

The defendants, set up an adverse title and possession.

*SPENCER*, Ch. J. who delivered the Opinion of the Court, said; "It was decided by this Court in the cases of *Jackson vs. Sears*, (10 Johns. Rep. 435,) and *Jackson vs. Stevens*, (16 Johns. Rep. 116,) that a grant in fee by the husband and wife, of the wife's lands, the deed not being acknowledged by her according to the Statute, passed only the husband's interest, and that the estate, after his death, reverted to her and her heirs. At the Common law, the alienation of her husband, who was seised in right of his wife, worked a discontinuance of her estate. This was remedied by the Statute of 32 H. VIII, Ch. 28, s. 6, and which has been re-enacted here, (1 *Greenleaf's Ed. L. N. Y.* 393,) and continued in the successive revisions of the Statutes. The Act was passed the 3d of *March*, 1787. The 2d Section declares, that no fine, feoffment or other act, made or done by the husband only, of lands, the inheritance or freehold of the wife, during coverture, shall work a discontinuance, or be prejudicial or hurtful to the wife, or her heirs; but that the wife, and her heirs, shall and may enter into all such lands, and hold the same according to their rights and titles therein, as if no such fine, feoffment or other act had been done.

"The deed to *Reilly*, in *January*, 1788, although the wife joined in it, was not within this Statute, for it was an act entirely null and void as to her. The Statute intended where the conveyance was to divest her right, that she should alien according to law, that is, by a deed acknowledged by her, before a magistrate thereto authorized. That deed then, operated only as a deed from *Ryers*, and did not divest the right of his wife, or her heirs.

"When, therefore, *Railly* re-conveyed to *Ryers*, the latter acquired no new right, but was merely re-invested with his former estate, the right to the possession during the coverture. The mortgage to the new loan officers, in 1792, by *Ryers*, is open to the same remarks. It had no effect on the wife's rights.

"It becomes wholly unnecessary to consider the effect of *Ryers'* mortgage to *Waln*, in *June*, 1800, for this action was brought within seventeen years thereafter.

"*Cornelia Ryers* died in *July*, 1795, and it becomes a question, whether the continuance of *G. Ryers* in possession from that time until his death, in *January*, 1802, acquired the character of a hostile and adverse possession as against the heirs of his wife. It is asserted by the defendant's counsel, that his possession became hostile and adverse immediately after the death of his wife, and they rely on the facts of his having erected buildings on the premises as early as 1796, and his claiming the premises to be his property.

"We must consider Mrs. *Ryers*, as entitled to that part of the *Corson* estate which she possessed before her marriage with *Ryers*, and which he possessed during the coverture, and afterwards in severalty. There is no evidence that the co-parceners ever made partition, but the undisturbed possession of one moiety of the *Corson* estate by *Simonsen*, and of the other by Mrs. *Ryers* and her husband, authorizes a presumption of a release among the co-parceners.

"As to *Elizabeth Sebring*, she was married to *Jacob Sebring*, before Mrs. *Ryers'* death. *Sebring* died in 1803. Unless, then, *G. Ryers* merely continuing in possession after the death of his wife, in 1795, claiming the premises as his, and erecting buildings thereon, constitutes an adverse possession, there is nothing to bar Mrs. *Sebring's* right to recover. It is observable, that *G. Ryers* made no conveyance of the premises after the death of his wife, until the 5th of *June*, 1800, when he executed a mortgage to *Waln*. I put out of view the deed to *Reilly*, and his conveyance to *G. Ryers*, as void and nugatory acts; *Ryers* must be considered as holding and enjoying the premises in consequence of his marital rights, and he was a tenant at sufferance after the death of his wife. 'An estate at sufferance is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all.'" (2 Bl. Com. 149.) 'And this estate may be destroyed whenever the true owner shall make an actual entry on the lands, and oust the tenant; for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger, and the reason is, because the tenant being once in by a lawful title, the law, which presumes no wrong in any man, will suppose him to continue upon a title equally lawful; unless the

"owner of the land by some public and avowed act such as entry is, "will declare his continuance to be tortious, or, in common language, "wrongful." (2 Bl. Com. 149, 150.) We perceive, then, that *Ryers'* "continuance in possession after the termination of the estate he held "in right of his wife, was a tenancy at sufferance, not tortious as regarded the true owners, and, consequently, not hostile or adverse to "their right. His claim of title and building on the premises, can have "no effect, for it does not appear that this was ever brought home to the "knowledge of the lessors. I do not mean to admit, that had the claim "been known to them, that a mere claim of title by a tenant at sufferance would create a disseisin, or a possession adverse to the true "owner. It is unnecessary to decide upon the operation of the mortgage by *Ryers* to *Wain*, in 1800, or whether that constituted an adverse possession, although I am of opinion it did not; and that there "never was an adverse possession until *Cairn's* entry, subsequent to the "sale in 1805."

"I have been more particular in stating the reasons of the decision of "the Court in this case than was necessary, as all the principles were "decided by this Court upon a state of facts between the same lessors "and *Cairns*, on a former occasion, but that decision was not reported. "We then decided, that *Ryers'* continuance in possession was not adverse, and that the lessors were not barred by the Statute of Limitations."

Where A. bought land in 1782, and put B. one of his sons in immediate possession, and declared he had bought it for him, and afterwards died in 1789, leaving several children, his heirs at law, and B. continued in possession of the land above 27 years, but without having obtained a deed from his father; it was *Held*, that B. was in possession under his father, and not in his own right, or adversely to his father; and that the rest of the children of A. were entitled to their proportion of the land so occupied by B. *Jackson ex dem. Bromley & Al. vs. Benjamin*, 8 Johns. Rep. 101.

The will of a husband does not pass his wife's land, and no possession of the same by a devisee under the will, can create a presumption of title, or become adverse to the true owner. *Bowie vs. O'Neale & Al. Lessee*, 5 Harr. & Johns. Rep. 226.

2nd. An adverse Possession must be hostile in its Inception; must be marked by definite Boundaries; must be an actual Occupancy, positive, notorious, uninterrupted, and continued for the Space of Time required by the Statutes of Limitations, in order to toll an Entry.

That an adverse possession may be a bar, strict proof is required that it was hostile in its inception, and had continued so for 20 years; and the possession must also be marked by definite boundaries. *Brandt ex dem. Walton vs. Ogden*, 1 Johns. Rep. 156. *Gay vs. Moffit*, 2 Bibb's Rep. 507. *M'Gee vs. Morgan*, 1 Marsh. Rep. (Ky.) 62.

A person out of possession for more than twenty years, where there is not an adversary possession in virtue of some right, or by actual inclosures, his heir, or a person claiming under him, may bring an Eject-



ment without actual entry into the land. *Hammond & Al. Lessee vs. Warfield*, 2 *Harr. & Johns. Rep.* 156.

The rule, that an adverse possession, to bar an Ejectment, must be hostile in its inception and continue so for 20 years, does not apply to the entry of the tenant; but to the act by which the possession becomes adverse. *Jackson ex dem. Krom vs. Brink*, 5 *Cov. Rep.* 483.

An entry adverse to the lawful possessor is not to be presumed. It must appear by proof. *Jackson ex dem. Gansevoort & Al. vs. Parker*, 3 *Johns. Cas.* 124.

If it be stated in a bill of exceptions, upon a trial in Ejectment, that the testator of the defendant departed this life in possession of the land, which possession he had held "*adverse to the Lessor of the Plaintiff*," for a specified time; it must be understood that such possession was adverse to those under whom the lessor of the plaintiff claimed; especially if it appear from another bill of exceptions, in the same trial, that the title of the lessor of the plaintiff did not commence, until after the death of the said testator. *Bream vs. Cooper's Heirs*, 5 *Munf. Rep.* 7.

If it appear from the record in Ejectment, that the defendant or his testator, had adverse possession of the land, at the time when a deed of trust, under which the plaintiff claims was executed, judgment ought to be rendered for the defendant, although the nature of his title do not appear. *Ibid.*

The plaintiff claimed the premises in question as heir at law of his father, and clearly made out a good title in his father; THE COURT, said, "It was incumbent on the defendant to shew, that that title had been defeated by an adverse possession agreeable to the Statute of Limitations, during the father's life time. This title by possession so as to defeat a grant, or other legal conveyance, is never to be presumed; but must be actually proved and shewn, in order to rebut a prior title, in the same manner and with the same degree of precision, as plaintiff must shew a clear title in him, before he can recover." *Rochell, ads. Holmes*, 2 *Bay's Rep.* 491.

It is a settled rule that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favour of possession in subordination to the title of the true owner. And if a person enter without pretence of title, his possession will be deemed the possession of the true owner. *Jackson ex dem. Bonnell & Al. vs. Sharp*, 9 *Johns. Rep.* 167.

"And wherever an adverse possession is relied on, it seems that there should be some proof of an actual ouster, for presumption of adverse possession from circumstances shall scarcely be deemed sufficient." 2 *Esp. N. Pri.* 9. (*Old Paging*, 435.)

A claim and colour of title sufficient to destroy all presumption that the defendant is in possession under the plaintiff, is adverse. *Jackson ex dem. Dunbar & Al. vs. Todd*, 2 *Caines' Rep.* 183. & *Vide Jackson ex dem. Putnam & Al. vs. Bowen*, 2 *Caines' Rep.* 358.

Where both plaintiff and defendant derived title from the same person, who had been seised of the premises, it is not necessary that the plaintiff should show a title out of the Commonwealth. *Patton & Al. vs. Goldsborough*, 9 *Serg. & R. Rep.* 47.

An ejectment cannot be defeated by the tenant's showing an adverse grant of the same date, without showing also that his possession was acquired under such adverse grant. *Bowman vs. Bartlett*, 4 *Bibb's Rep.* 554.

Whether a possession claiming title, under a parol gift of land from the owner, is such an adverse possession as will bar an ejectment? *Quære.* *Jackson ex dem. Bradt & Al. vs. Whitbeck*, 6 *Cow. Rep.* 632. *Jackson ex dem. Young & Al. vs. Ellis & White*, 13 *Johns. Rep.* 120.—*Sed Vide Jackson ex dem. Van Alen vs. Rogers*, (1 *Johns. Cas.* 33.) Where it is decided, that such a possession is not adverse to the grantor, and that the grantee was merely a tenant at will.

“In order to gain a title by possession under this act [*Statute of Limitations of North Carolina*] these circumstances must concur—he must be possessed of land which hath been actually granted; a possession of vacant lands will not do, unless attended with such circumstances as required by the late Act of Assembly for limiting the claim of the State—he must take possession with a belief that the lands possessed is his own, as under a patent, or deed under some patentee—he must take possession with such circumstances as are capable in their nature, of notifying to mankind that he is upon the land, claiming it as his own, as in person or by his tenant—this notorious possession must be a continued possession—a secret taking possession, and not continuing it, as it cannot answer the purpose of notoriety, to adverse claimants, cannot extinguish their claim for having not been put in in due time.” “A single act of taking possession and then leaving the land, will not do;” The possession that is capable of ripening into title, must be notorious, and continued for seven years without entry, claim or action, on the other side.”—*Den ex dem. Andrews vs. Mulford*, 1 *Hayw. Rep.* 320, 321. & *Vide Den ex dem. Park vs. Cochran & Al., Ibid.* 180. *Den ex dem. Slade vs. Smith, Ibid.* 249. *Borrets vs. Turner*, 2 *Ibid.* 114.

Possession of lands for seven years under colour of title bars the right of entry, although the possessor knew at the time he obtained his colour of title and took possession, that the lands belonged to another person. *Den ex dem. Raddick & Ux. vs. Leggat*, 3 *Murph. Rep.* 539.

But in the case of *Miller & Al. vs. Shaw*, 7 *Serg. & R. Rep.* 138, Gibson, J. said; “The truth is, that the Statute [*of Limitations*,] was never intended as the means of acquiring title, or as an encouragement to people to enter on each other's land with a view to hold it; but to compel them to decide their controversies while transactions are recent and the evidence of them is attainable; and there its operation in protecting a possession under a bad title, or no title at all, is but a consequence of the object of its enactment, and not the object itself.”

And in the case of *Den ex dem. Jones vs. Ridley*, (2 N. Car. Law Rep. 400.) TAYLOR, Ch. J. delivering the Opinion of the Court, said ; " But " a possession for this period can only meet the spirit and design of the " law, [the Statute of Limitations,] when it is unbroken and uninterrupted ; for as it is founded on the supposition that the possessor really believes he has title, this idea is weakened rather than confirmed, " by his occasionally withdrawing from the possession, and leaving the " land without cultivation, without occupancy, and without a tenant." & *Vide M Iver & Al. vs. Ragan & Al.*, 2 Wheat. Rep. 29. *Jackson ex dem. Ten Eyck & Al. vs. Frost*, 5 Cowen's Rep. 351 ; (both cited ante page 461.)

" In New-Jersey the action of ejectment has always been considered on the same footing with a writ of right, it has been too solemnly settled to be now disputed, that the Statute of James (Stat. 21 Jac. 1 c. 16. 3 Ruffhead, 100,) does not extend here ; and therefore all the legal consequences arising from that Statute, one of which is that twenty years adverse possession, like a descent cast, tolls an entry, falls to the ground." *Denn ex dem. Bickham vs. Pissant & Lardner*, 1 Cox's Rep. 222.)

*It must be marked by definite Boundaries.*

In the case of *Jackson ex dem. Hardenberg & Al. vs. Schoonmaker*, (2 Johns. Rep. 234.) KENT, Ch. J., who delivered the Opinion of the Court, said ;

" The possession fence, as it was termed, which was run round the " large tract in 1774, I do not consider as an adverse possession, sufficient to toll the right of entry of the true owner, after twenty years. " This mode of taking possession is too loose and equivocal. There " must be a real and substantial enclosure, an actual occupancy, a *possessio pedis*, which is definite, positive and notorious, to constitute an " adverse possession, when that is the only defence, and is to counter-vail a legal title." (The possession fence, in this case, was made by felling trees, and lapping them one upon another round the land.)

An adverse possession of more than 20 years without any demarcation or defined boundary, but on land which is afterwards included in a survey and patent, neither of which were of 20 years standing at the commencement of the suit, furnishes no available defence in an ejectment. *Shearer & Brooks vs. Clay*, 1 Littell's Rep. 260.

A naked possession, (possession without right,) is adversary only to the extent of actual enclosures. *Hammond & Al., Lessee, vs. Warfield*, 2 Harr. & Johns. Rep. 151. .

A possession of more than twenty years, when taken before the survey or patent, is limited by the actual close. *Brooks & Al. vs. Clay*, 3 Marsh. Rep. (Ky.) 545.

When an usurper enters on land he acquires possession inch by inch, of the part which he occupies. The possession of one who shews no title, when the extent of it is not shewn to have reached within a mile of

the *locus in quo*, cannot be considered a possession of it. *Prevost's Heirs vs. Johnson & Al.* 9 *Martin's Rep.* 123.

In the case of *Jackson ex dem. Teed & Al. vs. Halstead*, (5 *Cov. Rep.* 219, 220,) the *Opinion of the Court* was delivered by WOODWORTH, J.; he said; "The plaintiff is entitled to recover the small parcel of land lying between the 2 acres and 17 rods and the river; unless the deed from Palmer to Jennings is inoperative, in this respect by reason of an adverse possession at the time it was executed. The boundaries in the defendant's conveyance do not include this parcel. He cannot, therefore, rest on the ground of a good constructive possession; but must make out a *pedis possessio*, or actual occupancy, with claim of title. The adverse possession must be marked by a substantial enclosure, and continued down to render it available. (2 *Johns. Rep.* 234. 10 *Id.* 477. 1 *Id.* 156. 1 *Coven*, 285.)" "From the whole of the evidence I understand that the small parcel was enclosed by a fence on all sides, excepting on the northerly line, where it extended a part of the way only; and at that portion of the line where it did not continue, the high bank served as a substitute. For the purpose of notoriety, as well as good husbandry, this was a substantial enclosure. Why require a fence, where nature had formed a sufficient barrier, to prevent the intrusion of cattle? The defendant sufficiently marked the extent of his possession. Suppose a lot of land is bounded on the one side by a navigable river, or a continued ledge of rocks, or a mountain of difficult ascent or descent, and that the other sides are well enclosed; would not this with a claim of title, constitute an adverse possession? it certainly would; because in such a case every thing had been done, that could reasonably be required to protect the crop, or denote exclusive occupancy. The case before us is analogous. The defendant's possession was adverse when Palmer assigned to Jennings; and so continued to the time of commencing the action."

In the case of *Cheney vs. Ringgold & Al.*, (2 *Harr. & Johns. Rep.* 87, 94,) BUCHANAN, J. delivering the *Opinion of the Court*, said; "This is a case of two conflicting claims, in which the pretensions of both parties are set out. The lessors of the plaintiff with title, having possession by enclosure and cultivation of a part of the tract of land in dispute, claiming the whole; and the defendant without title, having possession by enclosure of a part of the same tract of land, with the use (by cutting timber, &c.) of other parts not enclosed. As to that part of the land which was in the possession of the defendant, and his ancestor, Charles Cheney, by actual enclosure for more than twenty years next preceding the bringing of this suit, the plaintiff is bound by the Act of Limitations; but not as to the parts used by the defendant exterior to the enclosure."

Where the defendant in an action of ejectment, was in possession of 100 acres of land, by enclosures and cultivation, for 15 years, and then enlarged his enclosures so as to include 150 acres, and he possessed the same, so enlarged by enclosures, for six years thereafter, claiming the same as his own. *Held*, that he had title to the 100 acres by adverse possession. *Hall vs. Gitting's Lessee*, 2 *Harr. & Johns. Rep.* 380.

*It must be an actual Occupancy, positive, notorious, uninterrupted; and continued for the Space of Time required by the Statutes of Limitations.*

Upon an unoccupied island in the river Delaware, one *Gould*, built a small house which was called his Study, in which he kept a table and some books, and occasionally repaired there for the purpose of studying. There was no evidence that he ever slept there, but his family resided on his property on the adjacent shore. *Gould* made no further improvements on the land, and some time previous to his death, he removed the study away from the island. During the whole period in which he held this possession, the neighbours were in the habit of driving their cattle on the island, and no exclusive appropriation was claimed by any one. It appeared that a possession of a similar kind continued in *Gould's* widow and children after his death in 1743, until some time in the year 1755, when, as it was alleged, one *Logan* ousted *Gould's* family from the possession, and he, and those claiming under him, had ever since retained it. The lessors of the plaintiff claimed under *Gould*, by virtue of a deed dated in March, 1786, from the heir at law of *Gould*, to *Samuel Tucker*; this conveyance recited a preceding one, made in the year 1776, which it was alleged, had been captured by the British, and lost or destroyed. Upon this evidence the plaintiff rested.

The defendant relied upon a possessory right under *Logan*, who it was proved, had possession of the property in 1755, built a house upon it, fenced and improved it. A paper was produced, purporting to be articles of agreement between *William Logan* and *Henry Bristol*, dated September 6, 1766; by which *Logan* conveyed all his right, improvement and possession, but the instrument was without seal. *Bristol* conveyed to *Ridley*. *Ridley*, January 18, 1775, conveyed his title to this property and some other things, to *William Yardley*, for a valuable consideration; *Yardley* conveyed to *John White*, the defendant, in 1776, for a valuable consideration. This paper title of the defendant had always been accompanied with the possession. *Held*, that "the facts proved were sufficient evidence of an adverse possession at least from 1776, (35 years before the trial) in the defendant and those under whom he claimed title, to bar the plaintiff's suit." *Den ex dem. Tucker & Uz. & Al. vs. White*, 1 *Coxe's Rep.* 94.

In the case of *Shannon vs. Kinney & Al.*, (1 *Marshall's Rep. (Ky.)* 4.) There was a continual adverse possession for more than twenty years, but it appeared that *Hugh Shannon*, who first took the possession of the land in controversy, before he had been in possession twenty years, surrendered the possession to the defendants or those under whom they held, in pursuance of a decree entered upon an award giving them the land in virtue of an adverse claim, and that they had not had the land in possession 20 years prior to the commencement of this suit. The Court *Held*, that this circumstance would not prevent the Statute of Limitations from operating as a bar to the plaintiff's recovery; that an adverse possession for twenty years would toll his right; and that it could not, "in the reason and nature of the thing, produce any difference, whether the possession be held uniformly under one title or at different times under different titles, provided the claim of title be always adverse to that of the plaintiff, nor whether the possession be held by

the same or a succession of individuals, provided the possession be a continued and uninterrupted one." & *Vide Hord vs. Walton*, 2 *Ibid*. 629.

In the case of *Lessee of Potts vs. Gilbert*, decided in the Circuit Court of the *United States* for the third circuit, and reported in the 1st volume of *Hall's Journal of Jurisprudence*, 255, 256, WASHINGTON, J., in charging the Jury, said ;

"The adverse possession before mentioned must not only continue, but it must continue the same in point of locality during the prescribed period of time sufficient to constitute it a bar ; that is to say, a roving possession from one part of a tract of land to another cannot bar the right of entry of the owner upon any part of the land which had not been held adversely for twenty-one years, although the different periods of possession of the separate parcels should amount in the whole to that number of twenty-one years. For it is a clear principle of law, that the right acquired by adverse possession of a disseisor or other, who enters or retains possession by wrong, can never extend beyond the limits of the particular spot to which his occupation was confined. If he could go beyond those limits, there would exist no other to circumscribe his claims. He cannot resort to the metes and bounds of the tract upon which he has settled, because the legal possession of the owner continues unaffected by the tortious entry ; except so far as the actual adverse possession has disturbed this, the legal owner is constructively in possession of the whole tract, because his title extends to the whole. A wrongdoer can claim nothing in relation to his possession by construction."

"The Court is perfectly clear that, where different persons enter upon land in succession, each retaining the possession for a period short of twenty-one years, the last possessor, who may be the defendant, cannot tack the possession of his predecessors to his own, so as to make out one entire continuing possession of twenty-one years, to bar the entry of the owner. The possession of *A.* the first occupant, cannot be the possession of *B.* the next occupant, because the moment *A.* quits the actual possession, the legal possession of the real owner is restored, and the entry of *B.* constitutes him a new disseisor, and if he seek to bar the entry of the owner, he must show an actual adverse possession continued in himself for twenty-one years.

"There is in truth no privity between *A.* and *B.*

"Neither do we think that the present case is strengthened in favour of the defendant by the evidence of the witness, who states that the several occupants sold to their successors. Nothing can be more vague than this testimony. It does not state that any conveyances were executed or what each person sold ; whether it was title, possession, or good will ; or whether any two of the sales were applicable to the same spot. Indeed, what had any of them to sell ?

"Not only is adverse possession to bar an entry to be confined to the particular parcel so occupied, but some evidence should be given to show the location of such parcel, that it may be seen whether the continuity of possession during the whole period was applicable to it."

The undisturbed possession of part of a tract of land, without title, is

no evidence that the persons holding such possession claimed the whole tract. *Corporation, &c. vs. Hammond, 1 Harr. & Johns. Rep. 580, 603.*

In the case of *Doe ex dem. Clinton & Al. vs. Campbell & Al.*, (10 Johns. Rep. 477,) THE COURT, after discussing the plaintiff's title, said ; "The remaining point in the case is, whether any title superior to this was shown on the part of the defendants, or any bar to the action by means of adverse possession. In the suit against *Campbell* there was no possession of 20 years pretended ; and the possession which one *Smith* commenced about 25 or 26 years before the trial, and under colour (as it was to be presumed) of a deed from one *Hake*, was on the farm occupied by *Elliot*. No other possession of 20 years standing was shown, and consequently, the defence of 20 years adverse possession could only apply to the suit against *Elliot*. And in the suit against him the adverse possession is unavailing. The possession commenced by *Smith* consisted only of a small clearing of 5 or 6 acres, and it is not ascertained in what part of *Elliot's* farm it was to be located. But the decisive objection to this defence is, that no regular deduction of title, or privity and continuity of possession, was shown and deduced down from *Smith* to *Elliot*, or to any of the other defendants. Adverse possession must be marked by definite boundaries, and be regularly continued down to render it availing. (*Brandt vs. Ogdens*, 1 Johns. Rep. 156.")

An adverse possession, is "a possession under colour of title, taken by a man himself, his servants, slaves, or tenants, and by him or them continued without interruption for seven years together." *Grant vs. Winborne*, 2 Hayne. Rep. 57.

Actual ouster, and adverse possession, of any lands, tenements or hereditaments, for fifteen years after the title, or cause of action accrued, and before suit brought, bars the plaintiff of his right of entry thereafter, whether the ouster and adverse possession be by the same person or persons, for the whole term of fifteen years, or by different persons for different periods, making fifteen years in the whole ; provided the disseisin and adverse possession have been continued and uninterrupted ; and provided, that the plaintiff does not come within any of the exceptions mentioned in the provisoes of the Statute, extending the term of time, in which entry may be made. *Fanning vs. Wilcox & Palmer*, 3 Day's Rep. 269.

To make out an adverse possession, the defendant must prove actual possession by enclosure of the tract which he claims, for upwards of twenty years. *Gibson vs. Martin*, 1 Har. & Johns. Rep. 545.

Twenty years possession, under a vague unsurveyed entry, affords protection, as an adverse possession, only to the extent of the actual close. *Henderson vs. Howard's Devises*, 1 Marsh. Rep. (Ky.) 26.

The settlement required by the Statute, limiting the time of bringing suits against actual settlers, is a settlement and residence on the land ; clearing and cultivating the land is not sufficient. *Hog vs. Perry* 1 Lauell's Rep. 171. *Smith vs. Novels*, 2 Ibid. 160. *Hite's Heirs vs. Shraeder*, 3 Ibid. 446. & *Vide Skyles' Heirs vs. King's Heirs*, 2 Marsh. Rep.

(Ky.) 385. *Anderson vs. Turner*, 3 *Marsh. Rep. (Ky.)* 133. *Bodley vs. Coghill's Heirs & Hord*, *Ibid.* 615. *Moore vs. Farrow & Al.* *Ibid.* 49.

To prevent the recovery in Ejectment by a Plaintiff having title, it is "necessary to shew on the part of the Defendant, an actual and continued occupancy of the land in dispute, for twenty years; and most certainly the occasional cutting of timber upon the land, does not amount to such a continued occupancy." *Brazdale vs. Speed*, 1 *Marsh. Rep. (Ky.)* 106. *Smith vs. Mitchel*, *Ibid.* 207. & *Vide Trotter vs. Cassidy & Al.*, 3 *Marsh. Rep. (Ky.)* 366.

An entry upon Land without Colour of Title, and occasional acts of cutting timber continued for fifteen years, but without any permanent improvements or enclosures, will not enable the claimant to defend in ejectment at the suit of the owner. *Dookittle vs. Lindsley*, 2 *Aiken's Rep.* 155.

In the case of *Cheney vs. Ringgold, & Al., Lessee*, (2 *Harr. & Johns. Rep.* 87, 95.) BUCHANAN, J. delivering the Opinion of the Court, said; "Even if the defendant's possession by enclosure commenced first, "which is not stated to be the case, that, and his cutting timber exterior "to the fences, could not have prevented the constructive possession "vesting by operation of law, in *Jordan*, of all the unenclosed parts of "The Number of Two, on the actual entry and enclosure made by him, "and those claiming under him, upon a part of that tract of land, with- "in twenty years from the date of the grant, claiming title to the whole. "But if the possession, by enclosure, of the lessors of the plaintiff, and "those under whom they claim, commenced first, and for any thing ap- "pearing in the record that may have been the fact, surely no cutting, " &c, by the *Cheneys*, exterior to their enclosures, could so divest the "possession, cast by law upon the plaintiff, of the unenclosed parts of "The Number of Two, as to let in the operation of the act of limita- "tions."

The possession that will give a title under the Statute of Limitations, must be an actual occupancy, a *pedis possessio*, definite, positive and notorious. *Bailey & Al. vs. Irby & Al.*, 2 *Nott & M'Cord's Rep.* 348.

Digging a canal and felling trees are not such acts of possession, as may be the basis of the prescription of thirty years. *Macarty vs. Fourcher*, 12 *Martin's Rep.* 11. & *Vide Prevost's Heirs vs. Johnston & Al.*, 9 *Martin's Rep.* 123.

"The occasional exercise of dominion, by broken and unconnected "acts of ownership, over property which may be made permanently "productive, is, in no respect, calculated to assert to the world, a claim "of right; for such conduct bespeaks, rather the fitful invasions of a "conscious trespasser, than the confident claims of a rightful owner." *Deu ex deu. Jones vs. Ridley*, 2 *N. Car. Law. Rep.* 400. (Per TAYLOR, CH. J. delivering the Opinion of the Court.)

But in the case of *Robinson vs. Swett & Al.*, (3 *Greenl. Rep.* 315, 319,) it was said, that the lands in dispute, "being wild and uncultivated, the "jury were not to expect the same evidence of occupancy which a cul-



"tivated farm would present to them ; but that facts and conduct on  
 "on the part of a person exercising acts of ownership and claiming,  
 "adversely, title and possession, would amount in law to possession of  
 "the land, and disseisin, if known and acquiesced in by him who has  
 "the right ; when if unknown and not acquiesced in by such party,  
 "they would not amount to such possession and disseisin, but only to  
 "successive trespasses."

Where the owners of contiguous lands "have established a fence varying from the line described in the deeds, and each party has held and occupied up to his side of the fence, claiming to hold accordingly, for twenty years ; neither can maintain a possessory action against the other." "But where the parties have agreed upon a fence variant from the line, avowedly for convenience, and still have continued to claim according to the true line, neither party acquires a title, or even a right of possession against the other, merely on account of the fence." *Burrell vs. Burrell*, 11 *Mass. Rep.* 298.

If the defendant in Ejectment set up the Act of Limitations, he must stand on his own possession, and cannot call in the possession of one whose title the plaintiff has purchased, to assist him. *Cluggage & Al. vs. Duncan's Lessee*, 1 *Serg. & R. Rep.* 111.

"Residence is not necessary, to make an adverse possession. Land may be inclosed and cultivated without residing on it. And the possession is as much adverse in one case as in the other." *Johnston vs. Irwin*, 3 *Serg. & R. Rep.* 292.

A title by warrant and survey, without patent, is within the Act of Limitations of 26th March 1785, [*Pennsylvania*] and is barred by an adverse possession of twenty-one years. *M'Koy vs. The Trustees of Dickinson College*, (*In Error*), 4 *Serg. & R. Rep.* 302.

In the case of *Pederick vs. Searle*, (5 *Serg. & R. Rep.* 240.) TILGHMAN, CH. J. delivering the Opinion of the Court, said ; "Let us consider then, "the force of the other reason urged by the plaintiff ; that the possession "having been delivered to the plaintiff by virtue of a recovery in a Court "of Justice, the Act of Limitations was thereby avoided, because the "continuity of the defendant's possession was broken. If the continuity of possession had been broken, before the expiration of 21 years, "the period required to give effect to our Act of Limitations, the argument would have been good. An entry within the 21 years, destroys "the efficacy of all prior possession, so that to gain a title under the "Act of Limitations, a new adverse possession for 21 years must be "had."

A possession to prevent a recovery, or vest a right under the Statute of Limitations, must be actual, continued, adverse and exclusive. An easement claimed out of the land of another, can never be the subject of such limitation, for it is not constant, exclusive, and adverse ; but a continued exclusive possession and enjoyment, with the knowledge and acquiescence of the owner of the inheritance, for twenty-one years, would be evidence from which a jury might presume a right, by grant or

otherwise, to such easement. *Cooper & Al. vs. Smith*, 9 *Serg. & R. Rep.* 26.

Persons having a right of entry into land at the time of passing the Act of Limitations of the 26th March 1785, are not barred by an adverse possession of 18 years from that time; there must be 21 years adverse possession to bar them of their right, whether their right existed before or arose after that act. *Packers Lessee vs. Gonsalus*, (IN ERROR,) 10 *Serg. & R. Rep.* 147.

In Pennsylvania, if defendant in ejectment rely upon the Statute of Limitations, he must show an adverse continued possession for 21 years: possession for fifteen years, under the act of 1785, is available only where the adverse possession existed at the time of the passing of the law. *Lessee of Griffith vs. Bradshaw*, *Circ. Ct. U. S. P. Oct.* 1821, *M. S.* (Cited in *Coze's Dig.* 273.)

"Possession of land so as to produce a bar, must be an actual possession of some part in dispute. Cultivation of part of the defendant's claim, not within the bounds of the disputed part, is not sufficient to authorize the bar of the Statute." *Napier's Lessee vs. Simpson*, 1 *Tenn. Rep.* 453.

*But it has been held, that a CONSTRUCTIVE adverse Possession of a small Tract of Land, may be admitted where the Defendant has a Paper Title for such small Tract, although he has been in the actual Occupancy of only a PART of such Tract.*

In ejectment, the defence of 20 years adverse possession, in order to countervail a legal title, must be supported by 20 years actual occupancy, or a substantial inclosure of the premises by the defendant, or by him and those through whom he derives title. A cultivation of part of the premises for that time, with a claim of title to the whole, will not constitute a defence beyond the portion actually improved. And even where such possession is under a deed or paper title, for a large tract of land (e. g. 783 Acres,) and only a small part is improved (e. g. 2 Acres,) with a claim of title to the whole, this will not constitute an adverse possession, beyond the actual improvement. And where one takes a deed, purporting to describe a tract of land; but which, by a mistake in the description, covers nothing; and the grantee, by occupation, takes possession of a part, and claims title to the whole of the supposed tract, under the deed, this is an adverse possession only as to the part actually improved. And, accordingly, in *Jackson ex dem. Dervient vs. Lloyd*, decided *October Term*, 1820, but not reported, where the defendant had a deed for Lot 4, but took possession of Lot 5, adjoining, believing it to be Lot 4, and claiming it as such, and improving a part: it was *Held*, that his adverse possession did not extend beyond his actual improvements. The doctrine of the constructive adverse possession of lands, by the cultivation of part, accompanied by a claim of the whole, under a deed, does not apply to large tracts of land, not purchased for the purpose of actual cultivation. The doctrine is in general applicable to a single farm or lot of land, only, purchased for the purpose of actual cultivation. A constructive adverse possession, must be founded on a

deed or paper title, though such title need not be a rightful one. *Jackson ex dem. Gilliland & Al. vs. Woodruff & Al.*, 1 Cow. Rep. 276. & *Vide Miller, &c. vs. Dow*, 1 Root's Rep. 412.

If a defendant in an action of ejectment, prove that he or those under whom he derived title, purchased the whole of the lot demanded—took a paper title therefor—went into possession under that title, and cleared one acre, more than fifteen years before the commencement of the plaintiff's action, and that the possession has accompanied such title, notwithstanding such title should prove invalid, he will hold the whole lot under the Statute of Limitations. A possession of a part under such purchase, being a possession of the whole, is a bar to the action. *Doe ex dem. Pearsall vs. Thorp*, 1 Chipman's Rep. 92.

If a patentee enters upon part of the land in controversy, with an intention of possessing the whole, it shall be considered as a possession of the whole; but if he enters upon a definite part, with a view to possess such part only, his possession is confined to such part. *Bowman vs. Bartlett & Al.*, 3 Marsh. Rep. (Ky.) 99. *Bodley vs. Coghill's Heirs & Hord*, *Ibid.* 615.

A lease of a small tract of land (e. g. 63 Acres,) and an actual possession by the lessee, of a part, with a claim of title to the whole, constitutes an adverse possession of the whole.

And while it is so possessed, a conveyance, by any one except the adverse possessor, to another, of a part of the land so possessed, though it also include an adjoining parcel not so possessed, and the grantee enter upon the latter parcel, claiming to the whole extent of his conveyance, will not constitute the grantee, a constructive or actual possessor, beyond the parcel on which he enters.

If one have constructive possession by colour of title, and occupying a part; another cannot acquire a constructive possession to the same extent in the same manner; but though the latter enter on part, with colour of title to the whole, and claim the whole, his possession will be confined in extent, to the part which he actually occupies. *Jackson ex dem. Husbrouck vs. Vermilyea*, 6 Cow. Rep. 677. & *Vide Calk vs. Lynn's Heirs*, 1 Marsh. Rep. (Ky.) 346.

A settler taking possession under one claim, without intending to intrude on another, but accidentally intruding, acquires no interfering possession out of his actual close. *Smith & Al. vs. Morrow*, 5 Little's Rep. 210. *M'Kinney vs. Kenny & Al.*, 1 Marsh. Rep. (Ky.) 460.

And this accidental and unintentional intruder selling his claim to another, (who holds an elder patent on the claim intruded on,) transfers no right of possession to his vendee, within the claim intruded on, except to the extent of the close. *M'Kinney vs. Kenny & Al.*, 1 Marsh. Rep. (Ky.) 460.

The right of entry in an elder outstanding patentee, is not tolled by an adverse possession of more than 20 years of a part of the land covered by such elder patent, except so far as the adverse possession extended. *Poorhies vs. Bridgeford*, 3 Marsh. Rep. (Ky.) 27.

If an entry be made on a demarked survey, but before patent issues thereon, the possessor is in possession to the extent of the lands, the limitation runs from the entry, and is not confined to the date of the patent. *Roberts & Al. vs. Sanders*, 3 Marsh. Rep. (Ky.) 29.

The holder of a descriptive warrant without survey, who has ascertained the limits of his claim by marked boundaries, taken up his residence on the land, cleared a large quantity and cultivated and improved it, is in possession of the whole tract; and if a third person enters on a part of it, nothing short of 21 years adverse possession, will bar the entry of the warrant holder. Such a case is not within the meaning of the 5th section of the Act of Limitation of 26th March, 1785, [of Pennsylvania.] *Gonzalus & Al. vs. Hoover & Al., Serg. & Rep.* 118.

But in the case of *Miller & Others vs. Shaw*, (7 Serg. & R. Rep. 143,) DUNCAN, J. said; "A wrongful possession cannot be extended by construction; constructive possession always accompanies the right. It is a contradiction in terms, that a man by wrong, should have any right, and that this right, by wrong should be extended by construction. There cannot be two conflicting constructive possessions, one in the owner and the other in the trespasser. The right always draws to it the possession, and it there remains, until seized by the wrong doer, whose possession is strictly *possessio pedis*; who must necessarily be confined to what he has grasped, his real and actual possession. Beyond that, no length of time will protect him; because beyond that, the owner's possession has never been changed; it always is in contemplation of law, continued in him. These are the dictates of common sense, of common justice, and of the common law. Did they need authority to support them, authorities abound in the decisions of the Courts of the several states, and of the Supreme Court of the United States." & *Vide Royer & Al. vs. Benlow*, 10 Serg. & R. Rep. 305.

Where a man enters on a tract of appropriated land, *without Title, or Colour of Title*, the Act of Limitations will not protect him beyond his actual enclosures. *Farley & Al. vs. Leno*, 8 Serg. & R. Rep. 392.—*Davidson's Lessee vs. Beatty*, 3 Har. & M'Hen. Rep. 621.

An improver who enters upon land held by another by warrant and survey, is protected after 21 years, by the Statute of Limitations as to all he encloses or cultivates without enclosure, but not as to those parts which remain in wood, and uninclosed; though he uses them for fuel, fences, &c. This is the general rule, but it seems there may be exceptions; such as the owner's confessing himself out of possession of the woodland uninclosed; suffering the improver to pay the taxes for it; or perhaps the case of a piece of uninclosed woodland lying between two neighbouring cultivated parcels, might be left to the jury. There may perhaps be other cases of exceptions. *Royer & Al. vs. Benlow*, 10 Serg. & R. Rep. 303.

But where a large Tract of Land is divided into Lots, the Possession of one Lot adversely will not create a constructive adverse Possession of the other Parts of the Tract, although claimed by the Defendants under the same Paper Title.

*In Jackson ex dem. Ten Eyck & Wife vs. Richards*, (6 Cow. Rep. 623.) The Opinion of the Court was delivered by SUTHERLAND, J., he said; "The Judge decided correctly upon the subject of adverse possession: that the tract H. being a large tract of land subdivided into different lots, the occupancy of any one of the lots would not give a constructive possession, or create an adverse possession of other parts of the tract, (*Jackson vs. Woodruff*, 1 Cowen. 276,) and as lot No. 12, the premises in question, was not actually possessed at the time of the marriage of the lessors of the plaintiff, there was no adverse possession to bar the right of the lessor *Ann Ten Eyck*. This question has been repeatedly decided by this Court. Indeed, the point was abandoned by the defendant's counsel upon the argument."

An alienee entering on his lands (which were bounded) gains a possession only to the extent of his limits, and that possession does not enure to the benefit of his alienor, or give him the possession of lands outside of the alienee's bounds. *Murray & Al. vs. Waugh*, 1 Marsh. Rep. (Ky.) 452.

A patentee extending shelter to an occupant, whose Possession is meted and bounded, acquires possession only to the extent of the occupant's claim. *Lee vs. M<sup>d</sup> Daniel*, 1 Marsh. Rep. (Ky.) 234.

But, a landlord settling a tenant on his patent, with an intent to gain possession, (giving his tenant no bounds) is *ipso facto* in possession to the limits of his patent. *Ibid.* 234.

Lands not susceptible of alienation cannot be acquired by prescription. *Mayor, &c. vs. Magnon*. 4 Martin's Rep. 2.

*Adverse Possession to be effectual must be continued for the Space of Time required by Statute.*

In the case of *Hall vs. Gittings' Lessee*, (2 Har. & Johns. Rep. 112, 126,) CHASE, Ch. J. said; "*Holland's park* having been legally granted to *George Holland*, nothing can defeat his title, and the title of his heirs, to the said land under his grant, but twenty years adversary possession."

The Act of Limitations runs in equity in favour of an adverse possession, where it would at law. *Harrison vs. Harrison & Al.*, 1 Call's Rep. 419. *Bell vs. Beemen & Al.*, 3 Murph. Rep. 273.

A bill in Chancery cannot be sustained to recover land from one who has been 20 years in possession prior to the commencement of the suit, and under a title from an adverse grant. *Wilson's Heirs vs. Bodley*, 2 Littell's Rep. 55, 59.

The shortest period which a Court of equity is bound to consider an absolute bar to a suit respecting real estate, in analogy to the limitation of actions at law, is twenty years. *Hawley vs. Cramer*, 4 Cowen's Rep. 718.

In the case of *Ward vs. Van Bokkelen*, (1 Paige's Rep. 101.) WALTHORTH, Ch. said; "If the conveyance was fraudulent, no period of

"time, short of twenty years, will prevent the person intended to be defrauded thereby from pursuing their remedy against the land in the hands of the fraudulent grantee, or her heirs, or devisees. Twenty years is the shortest limitation of actions at law respecting real property in this state, and by analogy to the Statute of Limitations, that is the shortest period which can bar a proceeding in this Court to set aside conveyances of real property, on the ground of fraud."

Twenty years at least are required to bar the equity of redemption in cases of mortgages of a legal or equitable interest in real estate. *Slee vs. The Manhattan Company*, 1 *Paige's Rep.* 80.

Possession for more than twenty years under an adverse title, bars relief in equity, except where the complainants laboured under some disability. *Floyd's heirs vs. Johnson & Al.*, 2 *Littell's Rep.* 109, 112.

The Maryland Statute of Limitations of three years is a good bar to an action of assumpsit for money had and received brought to try a title to lands in the city of Washington, under the 5th section of the Act of Maryland of November, 1791, ch. 45. *Beatty's Adm'rs. vs. Burne's Adm'rs.*, 8 *Cranch's Rep.* 98.

In the case of conflicting grants, twenty years possession will not avail the defendant in Chancery, unless he shows that he has obtained the elder grant for twenty years previous to the institution of the suit. *Boyle, Ch. J. delivering the Opinion of the Court*, said; "It is certainly a general rule that a Court of Equity will not relieve against a possession with right after the lapse of twenty years. Whether this rule is applicable to controversies like the present, growing out of original adverse claims, does not seem necessary to be decided in this case. For we are of opinion, that admitting it to be so, the case made out by the defendants does not entitle them to avail themselves of it; for they have not exhibited the grant under which they claim; Nor does the date of it appear from any part of the pleadings. It is indeed alleged by the complainant that is it elder than that under which he derives title: but his bears date only about nine years before the commencement of this suit. So that the grant under which the defendants claim, though elder than that of the complainants, may have been issued much less than twenty years prior to the commencement of this suit; and it is plain that previous to the emanation of their grant, the complainant could not maintain his suit: for it is that circumstance alone which gives to a Court of Equity jurisdiction of the cause; and until the cause of action arose, and the jurisdiction of the Court attached, laches cannot be ascribed to the complainant." *Briscoe, &c. vs. Prewet*, 4 *Bibb's Rep.* 370.

Twenty years' possession of an easement or use of a water course is a conclusive presumption of right, if unexplained. *Hazard vs. Robinson*, 3 *Mason's Rep.* 272. *Hurlbut vs. Leonard, Brayt.* 201.

An absolute right to a water course, may be acquired, by 15 years' uninterrupted possession, use, and occupation, claiming right thereto adverse to all others. *Rogers vs. Page & Al.*, *Brayt. Rep.* 201. & *Vide Hurlbut vs. Leonard, Ibid.* 202.

A right to a privilege appurtenant to land may be gained by an exclusive enjoyment for a sufficient length of time, in analogy to the Statute of Limitations; but no period short of that required by such Statute to gain a title to land will be sufficient for this purpose. *Sherwood vs. Burr*, 4 Day's Rep. 244.

If the grantor reserves to himself and his representatives, &c. a servitude or right of passage through the lands conveyed, *non user*, for twenty years, of such right or servitude, will entitle the grantee, or his representatives, to prescribe against it. *Powers vs. Foucher*, 12 Mart. Rep. 70.

Twenty years adverse possession of a diverted water course are indispensably necessary to defeat the proprietor of the ancient channel, and to repel his reclamation of his right. *Campbell vs. Smith*, 3 Halstead's Rep. 139. *Smith vs. Smith*, *Ibid.* 141. s. r. *Coallier vs. Hunter*, 4 Rand. Rep. 64.

And if the use of the water "was originally applied for as a loan;" "granted without consideration as a loan: and its subsequent enjoyment never claimed otherwise than as a loan; more than twenty years possession will not be adverse." *Coallier vs. Hunter*, 4 Rand. Rep. 64.

More than twenty years adverse possession and exclusive use of the lands over which a party claims a right of way, cannot be a bar to an action by him for obstructing such right of way. *Wright vs. Freeman*, (ON APPEAL) 5 Harr. & Johns. Rep. 468.

In the case of *Davis' Lessees vs. Davis' Heirs*, (2 Harr. & Johns. Rep. 295, 299,) where the question was whether a person under whom the plaintiff claimed title, died seised of the land for which the ejectment was brought; CHASE, Ch. J. said; "The facts and circumstances disclosed in evidence are not sufficient for the jury to presume a title in the heirs of *Parnell*, or a deed to *Parnell*, against the defendant, with sixty years possession. The entries on the rent roll should show a corresponding title. The strongest presumption in this case of a good title, is in favour of the defendant.

"The Court are of opinion, that the facts stated by the plaintiff, although the jury should find them to be true, are not sufficient and legal evidence to warrant the jury in finding that *Daniel Payne* and *Mary Payne* were seised of the lands, and died seised thereof, in opposition to the facts stated by the defendant, if the jury should find them to be true."

"The mere possession of Land without any claim of right gives no title, however long it may continue; and the true owner may lawfully enter upon such occupier at any distance of time, because he does an wrong to the occupant, who claims no right. It is the claim of title that makes the possession of the holder of the land adverse to all others." *La Frombois vs. Jackson ex dem. Smith & All.*, 8 Cow. Rep. 608. (Per JONES, Ch.)

*Adverse Possession cannot be sustained against the STATE, unless the State has EXPRESSLY restricted its own Rights by Statute.*

In the case of *Hall vs. Gitting's Lessee*, (3 Harr. & Johns. Rep. 112, 114.) CHASE, Ch. J. (with whom the other Judges, DUVALL & DUNCAN concurred) said; "The Court are of opinion that there is no adversary possession on the part of the defendant which can defeat the right derived from the state. Under the act of October, 1780, ch. 49, the state became actually possessed of the land; and that act dispenses with the requisites necessary in the case of the crown to avoid a possession adversary to the Rights of the crown, to wit, an office found or an actual entry. By an office found in England, the crown becomes actually seized and possessed of any escheat land in question. The state then had the right to pass the act of Assembly; and by that act, the state by its commissioners, was in as full possession of the land as if there had been an office found, or actual entry by the commissioners, and ouster of the defendant, or those under whom he claims."

*Et Vide ANTE, Page 46, Note [2.]*

In the case of *La Frombois vs. Jackson ex dem. Smith & Al.*, (8 Cow. Rep. 602, 603,) JONES, Ch., said; "If the title was in the people at the time, the possession of *La Frombois*, the purchaser, under the assumed ownership of *Maskay*, would not operate as a bar, unless after an actual possession of forty years; but as against all individual owners, twenty years would preclude the remedy by ejectment. An adverse possession will not obstruct the operation of a patent; and an occupier of land under an invalid claim of title, must have a continued possession of forty years to bar the people or their grantee from the recovery of the same by suit. But where an entry has been made on land vested in the people, by a private citizen claiming it as his own, and he is suffered to hold the premises for the space of forty years, the person so entering and so holding, will acquire the right freely to hold and enjoy the same against the people and their grantees. If then, the people, after such entry by a citizen, grant the land within the forty years by letters patent to another, the title of their grantee will prevail against the adverse possession of the occupier, if he asserts his right and evicts the intruder within the time allowed by law for his entry. But the grantee of the people in common with all other individuals, must perfect this title by entry upon the settler, within twenty years after his title accrues under the patent, or his entry will be barred, and his remedy by ejectment lost."

In the case of *Stewart & Al. Lessee vs. Mason*, (3 Harr. & Johns. Rep. 507, 531.) THE COURT, *Per* CHASE, Ch. J. said; "Until there is a grant for the land there can be no rightful possession against the proprietary, so as to bar him by Limitations."

*An Adverse Possession will not invalidate a DEVISE by the true Owner, while out of Possession of the Lands so held adversely.*

An adverse possession of lands, will not prevent the true owner though out of possession, from devising them. *Waring vs. Jackson ex dem. Eden & Al.*, 1 Peter's Rep. (Sup. Ct. U. S.) 570. *May's Heirs vs. Slaughter*, 3 Marsh. Rep. (Ky.) 505, 508.

A right of entry in land, is devisable, within the Statute of Wills, (1



*R L 52.*) though at the time of the devise, and of the devisor's death, the land be in the adverse possession of another. *Jackson ex dem. Eden & Al. vs. Varick & Al.*, 7 *Coven's Rep.* 238. *Affirmed unanimously, Varick & Al. vs. Jackson ex dem. Eden & Al.*, (IN ERROR,) 2 *Wend. Rep.* 166.

In the case last cited, [*Varick & Al. vs. Jackson, &c.*] WALWORTH, Ch. who delivered the unanimous Opinion of the Court, said; "There is no case in the English books, where it has been holden that a mere adverse possession, not amounting to a disseisin, is sufficient to prevent the owner from devising. And in *Goodright v. Forester*, (1 *Taunton*, 604, 613,) MANSFIELD, C. J. doubts whether even a technical disseisin has that effect at the present day. So far as there is any authority on the subject in our own reports, it is in favor of the right to devise, notwithstanding a mere adverse possession, (*Jackson v. Rodgers*, 1 *Johns. C.* 33;) and such I believe has been the general understanding of the profession in this state. The common opinion as to the effect of a technical or actual disseisin has probably been different.

"The Statute against champerty has no application to this subject. That is only in affirmance of the common law. It superadds penalties, but does not alter the legal effect of the sale of a pretended title. The penalties inflicted by that Statute are not applicable to the case of a devisor or devisee. Admitting the will to be in the nature of a conveyance, it could only take effect upon the death of the testator, when it would be too late to enforce the penalty against him; and it would be a singular proceeding to attempt to punish the devisee for the act of the devisor. He may refuse to take a conveyance, but I am not aware that he can prevent the operation of an absolute devise, any more than an heir at law can prevent a descent. Besides, such a construction of the Statute might frequently cast the property, by descent, upon the person who was wrongfully withholding the possession from the true owner.

"It has frequently been decided that judicial sales and assignments under the insolvent acts, or proceedings in bankruptcy, are not within the operation of that statute; and I can see no reasons why it should be applied to a devise, which are not equally applicable to such sales and assignments. There can be no danger that a man will devise his estate with a view to litigation, which cannot take place till after his death. It is much more reasonable to suppose he would confess a judgment, and suffer the estate to be sold on execution for that purpose."

*And IT SEEMS, that even a DISSEISIN, will not prevent a Devise by the DISSEISEE, from passing his Right and Interest in the Lands of which he is DISSEISED.*

In the case last cited, (2 *Wend. Rep.* 202,) WALWORTH, Ch. said; "Whether, under the British Statutes since the abolition of military tenures, there is any disseisin which will deprive the owner of property of the power of devising the same, is a question which does not arise under the facts of this case. The Statute 34 and 35 *Hen. 8.* (c. 5, sec. 4,) authorizes any person having a sole estate or interest in fee simple of and in any manors, lands, tenements, rents or other hereditaments

"in possession, reversion or remainder, to devise the same. And in *Goodright v. Forester*, (8 East's Rep. 567.) Lord Ellenborough appears "to have put some stress on the words in *possession, reversion or remainder*, as words of restriction or limitation. Where the true owner is absolutely divested of his estate, and the same is vested in the disseisor "by disseisin in fact, according to the ancient doctrines of the feudal "law, especially if the right of entry is taken away so as to reduce the "owner's claim to a *mere right*, it may not be correct to call it *an estate* "or *interest in possession*, in the words of the British statute, although it is "still an hereditament and descendible. Our statute of wills provides, "that any person having any estate of inheritance either in severalty, "in coparcenary, or in common, in any lands, tenements or hereditaments, may, at his own free will and pleasure, give or devise the same," &c. (Sess. 36, ch. 23, sec. 1.) It is hardly possible, in broader and "more explicit terms, to give a general power to dispose of any property, right or interest in real estate by will, whether the same is a vested freehold in possession of the testator or a mere descendible hereditament "or interest therein, in respect to which, he had only a right of entry, or "a mere right of action. But as the legislature, in the late revision, have "settled the rule of property as to all future devises, and being satisfied "there was no actual disseisin of the estate of Medcef Eden the younger proved on the trial, I think it is unnecessary for me to express any "opinion as to the power of a disseisee to devise, either under the British statute of wills or our own."

*And although it be a DISSEISIN IN FACT, as distinguished from a DISSEISIN by ELECTION, yet the Devise by the DISSEISEE will be equally effectual.*

*Vide ANTE, Page 40, Note [2.]*

The "*Revised Statutes*" of New-York, Part 2, Chap. 6, Tit. 1, §§ 1 & 2, (Vol. 2 pp. 56 & 57,) enact as follows:

"SECTION 1. All persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate, by a last will and testament, duly executed according to the provisions of this Title.  
"§ 2. Every estate and interest in real property descendible to heirs, "may be so devised."

In the case of *Varick & Al. vs. Jackson ex dem. Eden & Al.*, (IN ERROR,) 2 Wend. Rep. 166, it was decided,

1st. That "there can be no disseisin in fact, except by the wrongful "entry of a person claiming the freehold, and an *actual* ouster or expulsion of the true owner, or by some act tantamount thereto; such as a "common law conveyance, with livery of seisin, by a person actually "seised of an estate of freehold in the premises, or some one, lawfully "in possession, representing the freeholder, or by a common recovery, "in which there is a judgment for the freehold, and an actual delivery of "seisin by the execution, or by levying a fine, which is an acknowledgment of a feoffment of record."

2d. That "the holding over of a tenant for life, after the determination "of his estate, though he claims the fee, is not a disseisin of the right-ful owner.

3d. That "conveyances, which are not common law conveyances, "accompanied with livery of seisin, divest no rights but those of the "grantors."

Where a tenant for life conveys "all his right, title, and interest" in the land to the grantee and his heirs, with a covenant that he is seised in fee, only the life estate passes, for the covenant cannot enlarge the words of the grant so as to pass a fee by *Disseisin*. *Hurd vs. Cushing & Al.*, 7 *Picker. Rep.* 169.

*Et Vide ANTE, Page 38, Note [1.]*

The *Statute 32 Hen. 8, c. 33*, giving a right of entry upon the heir of a disseisor within five years from the disseisin, has been adopted in this commonwealth. [*Massachusetts.*] *Emerson vs. Thompson & Al.*, 2 *Picker. Rep.* 473.

*And as to what amounts to a DISSEISIN, Vide, also, ANTE, Page 40, Note [1]; and Page 42, Note [1].*

*Nor will an ADVERSE POSSESSION, or a DISSEISIN, prevent the Right and Interest of the true Owner, if a Debtor from passing by judicial Sales; or in the case of an Insolvent, by Assignment; or, as a Bankrupt, or an absconding or absent Debtor, by legal Proceedings pursued in such Case.*

"It has frequently been decided that judicial sales and assignments "under the insolvent acts, or proceedings in bankruptcy, are not withheld in the operation of that Statute." [*Act to prevent and punish Champerty and Maintenance, 1 R. L. 172.*] *Varick & Al. vs. Jackson ex dem. Eden & Al.*, (IN ERROR,) 2 *Wend. Rep.* 204. (Per WALWORTH, CH.)

The right of an absconding and absent debtor to real estate held adversely, passed to and became vested in the Trustees by the Act of the Legislature of New-York, passed April 4, 1786, entitled "An Act for relief against absconding and absent debtors." *Inglis vs. The Trustees of the Sailor's Snug Harbour*, 8 *Peters' Rep.* (Sup. Court, U. S.) 99, 131, 132.

*An adverse Possession cannot avail the Occupant, where the true Owner is under any of the Disabilities which are protected by the Statutes of Limitations.*

*Vide ANTE, Page 59, Notes [1], [2], [3] & [4]; and Page 60, Note [1].*

The Statute of Limitations cannot be set up in bar to a recovery against the Grand-children of a person dying seised, against whom there was no adverse possession, where, at the decease of the Grandfather, the Mother of the Lessors, through whom the estate descended to them, was under coverture, against whom the Statute had not begun to run, and the Action is brought within ten years after the decease of their Father the Tenant by the curtesy. *Moore vs. Jackson ex dem. Erwin & Al.*, (IN ERROR,) 4 *Wend. Rep.* 59.

*And, an adverse Possession commenced during the Existence of a PARTICULAR STATE, cannot prejudice the Right of the Person entitled in Reversion or Remainder, until after the Termination of such PARTICULAR ESTATE.*

Vide ANTE, Page 59 Notes [1], [2] & [3].

Whether, or not, a Possession is ADVERSE, is to be determined by the jury, and not by the COURT.

The question of adverse possession ought to be left to the jury. *Jackson ex dem. Jadwin vs. Joy*, 9 Johns. Rep. 102. *Jackson ex dem. Beekman vs. Stephens*, 13 Johns. Rep. 496. *Gayetty vs. Bethune*, 14 Mass. Rep. 55. *Jackson ex dem. Sparkman vs. Porter*, 1 Paine's Rep. 466. *M'Clung vs. Ross*, 5 Wheat. Rep. 124. *Cummings vs. Wyman*, 10 Mass. Rep. 468.

Whether a possession were or were not adverse is a question of fact, and must be determined by the jury. *Atherton vs. Johnson*, 1 New Hamp. Rep. (R. & W.) 34.

And the judge having directed the jury as to that fact, a new trial was granted. *Jackson ex dem. Jadwin vs. Joy*, 9 Johns. Rep. 102. & Vide *Runcorn vs. Doe ex dem. Cooper*, (In Error,) 5 Barnew. & Cress. Rep. 696.

Whether there was a possession of Land adverse to the Grantor, at the time it was conveyed, so as to render the deed thereof void under the Statute of 1807 [of Vermont] is a question of fact to be submitted to the jury; and is not to be determined by the Court as an interlocutory question. *Stevens vs. Dewing*, 2 Aiken's Rep. 112.

In the case of *Pray vs. Pierce*, (7 Mass. Rep. 383.) THE COURT Held, That a trespass on the land of another will not amount to an ouster without a knowledge thereof by the owner, either express or implied; and they said; "But whatever may be the evidence of this notice, it is a fact to be found by the jury, and the Court cannot presume it."

"The Court were also of opinion, that with what intention, by what right, a person entered into land and possessed it, and to what extent, were facts proper for the consideration and determination of the jury." *Helm's Lessee vs. Howard*, 2 Har. & M'Hen. Rep. 76.

In the case of *Seymour vs. De Lancey & Al.*, (1 Hopk. Rep. 449,) SANFORD Chancellor, said; "If William Seymour acquired a title by adverse possession, such a title would preclude all other inquiries; and the inquiry whether his possession was adverse or not, and the length of such a possession, are questions of fact. The inquiry whether the deed from Henry E. Lutterloh, is genuine or not, is purely a question of fact. These questions are peculiarly proper for the trial by jury as the best method of ascertaining their truth."

If a plea of prescription be received at the trial, the party pleading it must be permitted to submit the fact of his possession to the jury. *Porter vs. Dugat*, 9 Martin's Rep. 92.

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The Statute of Limitations does not, in terms, apply to Chancery cases, but the Chancery Courts will never interfere when by lapse of time

the Law Judge would not hold jurisdiction. *Frame vs. Kenny's heirs & Exors.*, 2 *Marsh. Rep. (Ky.)* 145. *Elmendorf vs. Taylor & Al.*, 10 *Wheat. Rep.* 152. *Marquis of Cholmondeley vs. Lord Clinton*, 2 *Jac. & Walk. Rep.* 192. & *Vide Wallace & Al. vs. Duffield & Uz.*, 2 *Serg. & R. Rep.* 521. *M'Dowell vs. Heath's Ex'ors.*, 3 *Marsh. Rep. (Ky.)* 223. *Hamilton, Ex'x. vs. Shepperd, Adm'r. &c.*, 3 *Murph. Rep.* 115. *Van Rhyn vs. Vincent's Ex'ors.*, 1 *M'Cord's Ch. Rep.* 314.

Twenty years adverse possession under a legal title is a bar to a bill in Equity, as well as to an Ejectment. *Hinton vs. Fox*, 3 *Littell's Rep.* 382. & *Vide Demarest & Uz. vs. Wynkoop & Al.*, 3 *Johns. Ch. Rep.* 129. *Reed & Glen vs. Bulloch & Al.*, *Littell's Selected Cases*, 512. *Shepherd's Heirs vs. Young*, 1 *Monr. Rep.* 205. & *Vide References* UT SUPRA.

"It is well settled both in Kentucky and in this Court, (*Sup. Court U. S.*) that a possession which will bar an Ejectment, is also a bar in "Equity." *Hunt vs. Wickliffe*, 2 *Peters' Rep. (Sup. Court U. S.)* 212.

It must be 20 years' adverse possession of the land in contest. *Spurr & Al. vs. Trimble & Al.*, 1 *Marsh. Rep. (Ky.)* 281.

A mortgagor cannot redeem after a lapse of twenty years, after forfeiture and possession by the mortgagee, (which period has been adopted in Equity by analogy to the Statute of Limitations,) no interest having been paid in the mean time, and no circumstances appearing to account for the neglect. *Hughes & Al. vs. Edwards & Uz.*, 9 *Wheat. Rep.* 489.

Fifteen years' possession, where no statute disabilities, or special circumstances equivalent thereto exist, will bar an equity of redemption. *Skinner vs. Smith*, 1 *Day's Rep.* 124.

Satisfaction of a mortgage is to be presumed after 20 years' possession by the mortgagor, without payment of interest, demand or acknowledgment. *Christophers vs. Sparke*, 2 *Jac. & Walk. Rep.* 223.

"A lapse of less than twenty years from the accrual of the right of suit, is no bar to the assertion of an equitable right in a Court of Chancery, as it would not be to the assertion of a legal right in a Court of Law." *Fraily vs. Langford & Al.*, 1 *Marsh. Rep. (Ky.)* 364.

Twenty years at least are required to bar the equity of redemption in cases of mortgages of a legal or equitable interest in real estate. *Slee vs. The Manhattan Company*, 1 *Paige's Ch. Rep.* 80.

"We do not suppose that the Statute of Limitations in terms applies "to the case, but it is no less obligatory upon a Court of Equity than "upon a Court of Law, and it is considered as the rule of decision in "relation as well to equitable as legal rights. In reference to the latter, "a Court of Equity decides in obedience to the Statute, and in refer- "ence to the former, it conforms to the Statute by acting upon its princi- "ples according to the rule *equitas sequitur legem*." (*Per BOYLE, Ch. J. delivering the Opinion of the Court*), *Layle & Al. vs. Rowton*, 1 *Marsh. Rep. (Ky.)* 519.

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## CHAPTER V.

Page 103, n. [1.] Tenant dies intestate in possession of certain premises. His widow after continuing to occupy for several years, paying rent to the landlord, marries a second time, and her husband enters into possession, and pays rent for several years to the landlord; and, upon the death of the wife, the personal representative of the first husband obtains administration of his estate and effects, and brings Ejectment to evict the second husband: *Held*, that the action was maintainable without giving a formal notice to quit. *Doe vs Bradbury*. 2 *Dowl & Ryl. Rep.* 706.

Page 104, n. [1.] Landlord enters into an agreement with tenant, on 2d January, 1815, to grant the latter a lease for eight years, of certain premises, the agreement to take effect from the 10th October, 1814, from which time tenant had been in possession, yielding 2s. 6d. yearly, and in case he held over after the term, he was to pay 40s. per diem for every day he retained possession. The lease was never granted. At the expiration of the term tenant held over, after having been served with a nine month's notice, to quit at the end of the year for which he held, which should first happen after the expiration of half a year from the date of the notice. He was then served with a written demand of possession, and the same paper notified to him, that if he did not yield quiet possession, an Ejectment would be brought: *Held*, 1. that the tenant was not to be treated as a tenant from year to year; and, 2. that the demand of possession was sufficient notice within 1 *Geo. 4*, c. 37, so as to entitle the plaintiff to the benefit of the undertaking, and security required by that Statute. *Doe dem. Marquis of Anglesey vs. Roe*, 2 *Dowl. & Ryl. Rep.* 565.

Page 127, n. [1.] A notice dated 27th and served on the 28th September, requiring a tenant to quit at “Lady-day next, or at the end of

his current year," must be understood to mean a six month's, and not a two day's notice to quit. *Doe ex dem. Lord Huntingtower vs. Culliford*, 4 Dowl. & Ryl. 248.

Upon a written agreement to demise from the following "Lady-day," a notice to quit "on the 6th of April," is good, upon parol evidence that by "Lady-day," the parties meant "Old Lady-day." Such evidence is admissible, where the written agreement is not under seal. *Den ex dem. Peters & Uz. vs. Hopkinson*, 3 Dowl. & Ryl. Rep. 507.

Page 145, n. [1.] The Statute, 1 Geo. 4, c. 87, for enabling landlords more speedily to recover possession of lands and tenements unlawfully held over by tenants, does not extend to the case of a lessee holding over after notice to quit given by himself, where his tenancy has not expired by efflux of time. *Doe ex dem. Cardigan vs. Roe*, 1 Dowl. & Ryl. Rep. 540.

Page 163, n. [1.] Covenant "not to let, set, assign, transfer, set over, or otherwise part with, the premises demised, or the lease," of a coffee house, is not broken by proof of a deposit of the lease with the brewers of the lessee, as a security for beer supplied to the house. *Doe ex dem. Pitt vs. Hogg*, 4 Dowl. & Ryl. Rep. 226.

## CHAPTER VII.

Page 184, n. [1.] The Statute 48 Geo. 3, c. 149, sch. 2, requiring an office copy of the declaration to be written in the usual and accustomed manner, on which a duty of 4d, per sheet is imposed, and it not having been the practice to write such copies on both sides of the stamped sheet of paper:—*Held*, that service of seventeen office copies of declarations in Ejectment so written and delivered to as many tenants in possession, was irregular. *Doe ex dem. Irvin vs. Roe*, 1 Dowl. & Ryl. Rep. 562.

Page 189, n. [1.] If the lease in a declaration in Ejectment, is stated to have been made on the 7th day of July, 1825, to hold from "the sixth day of July then last past," it shall be construed to mean the 6th day of July, 1825, and not the 6th day of July, 1824, which was prior to the accrual of the plaintiff's title; for where the words may be rendered either way, that construction which renders the fictitious demise useful to the action, ought to be adopted, rather than that which would destroy it. *Den ex dem. Burhans vs. Vanness*, 5 Halst. Rep. 102.

Page 197, n. [2.] The plaintiff may recover, though the defendant be in possession of less than is declared for. *White vs. Saint Guirons*, 1 Minor's Rep. (ALABAMA,) 331.

Page 207, n. [2.] Where several tenants have been duly served with a copy of a declaration in Ejectment, judgment may be entered against the casual Ejector, although the notice at the foot of the declaration was not addressed to any or either of such tenants. *Doe ex dem. Pearson vs. Roe*, 5 Moore's Rep. 73.



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Page 210, n. [2.] Service of a declaration in Ejectment on the servant of the tenant in possession, with a subsequent acknowledgment from the Attorney of the latter, that the declaration had been received, is sufficient for judgment *nisi* against the Casual Ejector. *Doe ex dem. Teverell vs. Snee*, 2 Dowl. & Ryl. Rep. 5.

Page 211, n. [1.] If the service of the declaration in Ejectment, is not in the regular and ordinary manner, a judgment by default, for want of an appearance, should not be entered, until the Court on a rule to shew cause, has sanctioned the mode of service. *Den ex dem. Auten vs. Fen, The President, &c. of the Bridgewater Copper Mining Company, Tenants*, 5 Halst. Rep. 237.

Service of declaration in Ejectment by leaving it with the daughter of the tenant in possession, (who was confined by indisposition,) with an affidavit that the daughter acknowledged the receipt of the declaration, and that she had read it over and explained it to her mother before the essoign day of the term, sufficient for a rule *nisi* for judgment against the Casual Ejector. *Doe vs. Roe*, 2 Dowl. & Ryl. Rep. 12.

Service of the declaration in Ejectment upon the wife of the tenant in possession, without stating that it was served at the husband's house, or on the premises, insufficient to support a rule for judgment against the Casual Ejector. *Right ex dem. Bomsall vs. Wrong*, 2 Dowl. & Ryl. Rep. 84.

Page 212, n. [1.] Service of the declaration in Ejectment upon the servant on a Saturday, with an acknowledgment by the tenant on a Sunday, insufficient for a judgment against the casual Ejector. *Goodtitle ex dem. Mortimer vs. Notile*, 2 Dowl. & Ryl. Rep. 232.

Service of the declaration in Ejectment must be before the essoign day of the term; but where the service was before that day, and the explanation of it to the tenant in possession did not take place till after: *Held*, that the lessor of the plaintiff was not entitled to judgment. *Doe vs. Roe*, 1 Dowl. & Ryl. Rep. 563.

An affidavit of service of a copy of the declaration and notice in Ejectment, on the son of the tenant in possession, and that the tenant acknowledged that he had received the same, is not sufficient; as it must state that such acknowledgment was made before the essoign day. *Doe ex dem. Mac Dougal vs. Roe*, 4 Moore's Rep. 20.

Page 217, n. [1.] An affidavit of the service of a declaration in Ejectment, which states that the copy was "served upon A. B., said to be one of the directors of the within named Company," is insufficient. *Den ex dem. Auten vs. Fen, The President, &c., of the Bridgewater Mining Company, Tenants*, 5 Halst. Rep. 237.

The notice subjoined to the declaration must be read, or its contents explained to the person to whom it is delivered, or such person must be informed of the intent and meaning of the service; and that it has been so done, should be stated in the affidavit. *Den ex dem. Auten vs. Fen, The President, &c., of the Bridgewater Copper Mining Company, Tenants*, 5 Halst. Rep. 237.

In the affidavit on which to move for judgment against Casual Ejector, in the case of a vacant possession, where one copy of the declaration was sworn to have been fixed on the premises, and another served on the lessee, but not on the premises, it is necessary to state that such lessee was tenant in possession at the time of the service. *Doe ex dem. Seabrook vs. Roe*, 4 *Moore's Rep.* 350.

In Ejectment, if one part of the premises be vacant, and the other in the occupation of a tenant, it is sufficient for an affidavit to ground a motion for judgment against the Casual Ejector, to state, that a copy of the declaration was served on the tenant who occupied the one part, and that another copy was affixed to the door of that part which was vacant. *Doe ex dem. Evans vs. Roe*, 4 *Moore's Rep.* 469.

Page 219, n. [1.] Judgment signed against the Casual Ejector, where the service was upon the wife of the tenant in possession, who had left the kingdom, and was settled in a foreign country. *Doe vs. Roe*, 1 *Dowl. & Ryl. Rep.* 514.

Page 225, n. [1.] A judgment by default in Ejectment, against the Casual Ejector, for want of an appearance, will not be set aside because the declaration in Ejectment was served by the lessor of the plaintiff. *Den ex dem. Aulen vs. Fen, The President, &c., of the Bridgewater Copper Mining Company, Tenants*, 5 *Halst. Rep.* 237.

#### CHAPTER X.

Page 247, n. [4.] Tenant may show his landlord's title at an end, in Ejectment brought against him by the landlord; but where Ejectment was brought by the reversioner, whose interest was the same as that of the tenant for life, and the tenant had paid rent to the reversioner: *Held*, that he could not show that the reversioner's interest was at an end; but he might show some prior title in the person under whom he claimed to hold. *Doe ex dem. Colemere & Al. vs. Whitroe, Dowl. & Ryl. N. P. Cases*, 1.

Page 259, n. [1.] Where a testator being seised in fee of several estates, in the parish of C., partly paternal, and the remainder purchased at different times, devised the whole [consisting of *nineteen messuages* and *eighteen acres of land*] to his wife in fee, and afterwards levied a fine "of *twelve messuages*, twelve gardens, twenty acres of land, twenty acres of meadow, twenty acres of pasture, five acres of wood, and five acres of land covered with water," and died suddenly without re-executing his will: *Held*, in Ejectment by the heir at law, for the paternal estate (on the ground that the fine operated as a revocation of the will,) that parol evidence was admissible to restrain the operation of the fine to one of the purchased estates on which were *twelve messuages*, so as not to pass the estate in question. *Den ex dem. Bulkley vs. Wilford*, 8 *Dowl. & Ryl. Rep.* 549.

#### CHAPTER XI.

Page 289, n. [1.] In an action of Trespass to try Titles, damages for *Meme Profits*, as well as the possession, may be recovered. *White vs. Saint Guirons*, 1 *Minor's Rep.* (ALABAMA,) 331.

Page 294, n. [1.] Judgment in Ejectment set aside because signed too soon. *Doe vs. Hedges*, 4 Dowl. & Ryl. Rep. 393.

Page 295, n. [1.] The Statute 59, Geo. 3, c. 12, s. 17, empowers church-wardens and overseers to take lands and hereditaments in the nature of a body corporate, and declares that in all actions brought in respect thereof, it shall be sufficient to name the church wardens and overseers for the time being, describing them as the church-wardens and overseers of the poor, of the parish for which they shall act, and naming such parish. Where a declaration in Ejectment by church-wardens and overseers, contained two set of counts, one describing them by their office, without their names, and the other by their names without their office: *Held*, after verdict, the objection, if any, was cured. *Doe ex dem. the Church-Wardens & Overseers of the Parish of Orleton vs. Harpur*, 2 Dowl. & Ryl. Rep. 708.

#### APPENDIX.

Page 501. *H. S.* devises his estate to his wife in fee, and dies seized, leaving his widow and two sons, him surviving. After his death, the widow and the younger son, by deed of bargain and sale, convey the Estate in fee to *H.*, without the privity of the eldest son and heir at law of the testator. *H.* continues in undisturbed possession of the estate for twenty two years, and dies possessed, bequeathing it to his children. Six years after *H.* entered into possession, *W. S.* the eldest son and heir at law of *H. S.*, makes his will, and devises all his real estate to his wife, and his younger brother, in trust for the life of the wife, and then to his children, and dies three years afterwards, without ever disturbing *H.*'s possession: *Held*, that the trustees might maintain Ejectment, to recover the possession of the estate, notwithstanding *H.*'s quiet enjoyment of twenty-two years. *Doe ex dem. Souter & Al. vs. Hull*, 2 Dowl. & Ryl. Rep. 69.

THE END.

















